
(1924) 03 PAT CK 0014
In the Patna High Court

Sitbaran Jha Pandey

APPELLANT

Vs

Lokenath Missir

RESPONDENT

Date of Decision : 12-03-1924

Acts Referred:

Citation : 81 Ind. Cas. 1052

Hon'ble Judges : Ross, J; Das, J

Bench : Division Bench

Judgement

Das, J.—I am unable to agree with the view expressed by the learned Taxing Officer in his order dated the 18th January, 1924. The suit was clearly one for possession and for partition. It was contended before the Taxing Officer that the plaintiffs were in possession of the disputed lands, and that, there being no complete ouster, they were not bound to pay ad valorem fees, but only a fee for partition. I quite agree that if it were the case of the plaintiffs in the plaint that they were in possession of some of the properties sought to be partitioned, they could not be called upon to pay the ad valorem fee. But that is not the case of the plaintiffs in the plaint. On their own allegations the plaintiffs were not in possession of any portion of the properties sought to be partitioned, and it is sufficient to refer to the reliefs claimed to show that the suit of the plaintiffs was one for joint possession and for partition. I need not pursue this subject any further, for I am in entire agreement with the view expressed by the Taxing Officer on this point.

2. But then the Taxing Officer took the view that the plaintiffs ought not to be called upon to pay the fixed fee leviable in a suit for partition in addition to the ad valorem, fee in a suit for possession. He held that the suit in reality is one "for being put in possession" by means of partition", and that only one fee is necessary, namely, an ad valorem fee. He conceded that if it could be shown that the suit embraced two "subjects" within the meaning of that term as employed in the Court Fees Act, something might be said in favour of the view taken by the Stamp Reporter; but he thought that the suit did not embrace two "subjects",

the only subject of the suit being "recovery of possession by means of partition." In this view, he came to the conclusion that the plaintiffs ought not to be called upon to pay the fixed fee leviable in suit for partition.

3. With all respect, I am unable to take the same view. I agree that the test is to see whether the suit embraces two "subjects" within the meaning of Section 17 of the Court Fees Act. Now, although the difference in the jurisdictions of Courts of Common Law and Courts of Equity in England does not obtain in this country, it is still useful to refer to that in dealing with the point whether the plaintiffs' suit should be regarded as one for possession and partition or as one for possession by means of partition." Before the Judicature Act, the Court of Chancery had jurisdiction to pass a decree for partition, provided there was no question of title or of possession to be tried between the parties. This was commonly expressed by saying that "the suit for partition is based, on the assumption that there is no litigation." [See *Shade v. Barlow* (1839) 7 Eq. 296 at p. 301 : 38 L.J.Ch. 369: 20 L.T. 10 : 17 W.R. 366]. But if a question of title or of possession was raised by the defendant, or if the plaintiffs' suit disclosed that there was a question of title or of possession to be tried, the Court of Chancery declined to go on with the partition, suit, until those questions the litigation between the parties had been determined by the Court of Law. The ordinary procedure was to direct the suit in Chancery to be retained for a year, and to give liberty to the plaintiffs, to bring such actions at law as they may be advised. Now, if a suit for joint possession and partition could be regarded as a suit for possession by means of partition, it would be sufficient for a plaintiff, before the Judicature Act, to go to the Court of Law and to ask that Court to give him all the reliefs claimed by him. It would be unnecessary for him to go first to the Court of Law and then to the Court of Chancery in order to obtain an adjudication of his title and a decree for partition. The Judicature Act has, no doubt, simplified the procedure in that it has given power to the Chancery Division to adjudicate on disputed questions of title; but the law remains what it was, namely, that a party seeking partition must ask for joint possession, if he is out of possession, as a condition precedent to a decree for partition. The causes of action are entirely different, and the one is not included in the other. The change introduced by the Judicature Act is a change in procedure, not a change in substantive law.

4. In this country we are governed by the Code which allows a plaintiff to unite in the same suit several causes of action against the defendant. But for this provision, the Court would have to tell the plaintiff who, being out of possession, is asking the Court to pass a decree for partition, that he must proceed by ejectment and establish his title, and then come for partition. The provision in the Code has, no doubt, simplified the procedure; but the substance remains the same, namely, that a person cannot be allowed, under a guise of a partition action, to bring an action of ejectment, unless he asks the Court to determine his title and to give him the appropriate relief as in an action of ejectment. In England, before the Judicature Act, a plaintiff had to bring two actions, one at law and the other in equity. Under the Judicature Act in England and under the

CPC in India, he may bring one suit and unite several causes of action in that suit. The difference, as I have said, is in procedure, and not in the substantive rights of the parties. In my judgment, the present suit embraces two distinct causes of action, and, therefore, two subjects within the meaning of section 17 of the Court Fees Act. That being so, the plaintiffs must pay the fixed fee for partition in addition to the ad valorem fee as in a suit for possession.

5. Ross, J.--I agree.