
(2005) 10 MAD CK 0010
In the Madras High Court
Case No : C.R.P. (PD) No. 1743 of 2003

Subha and Swathi @ Sikkanam

APPELLANT

Vs

Ramu, Rani, Mala and R.M. Natarajan

RESPONDENT

Date of Decision : 06-10-2005

Acts Referred:

Hindu Succession Act, 1956 — Section 6
Limitation Act, 1963 — Article 91
Madras Court Fees (Amendment) Act, 1922 — Section 7
Tamil Nadu Court Fees and Suits Valuation Act, 1955 — Section 40

Citation : (2005) 5 CTC 444 : (2006) 3 LW 931 : (2005) 4 MLJ 637

Hon'ble Judges : A. Kulasekaran, J

Bench : Single Bench

Advocate : Srinath Sridevan, for the Appellant;

Judgement

A. Kulasekaran, J.—The plaintiff is the revision petitioner herein, who has filed a suit in O.S.No.41 of 2002 before the Sub Court, Tiruvarur

for partition. In the said suit, the respondents herein have filed a written statement, alleging that the petitioners ought to have paid Court fee u/s

37(1) of the Act. Pursuant to that notice dated 21.10.2002 was issued by the trial Court, directing the petitioner herein to value u/s 37(1) of

Tamilnadu Court Fees and Suits Valuation Act (in Short 'the Act'). Objections were filed by the petitioners stating that they are in joint

possession, the other family members have a right in coparcenary/joint family properties, without their consent alienated petitioners" share which is

not binding on them in respect of their share is concerned, hence not liable to pay Stamp Duty u/s 37(1) of the Act and maintain the same to be

paid u/s 37(2) of the Act is perfectly valid. The trial Court has directed the petitioner to pay deficit Court fee u/s 37(1) of the Act within a period of

three weeks, the same is challenged in this CRP.

2. The learned counsel Mr. Srinath Sridevan appearing for the petitioner submit that the trial Court without considering the petitioners objection

passed a non-speaking impugned order; the petitioners are unmarried daughters as on 01.06.1990 became automatically co-owners to be treated

on par with other male sharers; the petitioners are in joint possession of the said property; hence the impugned order directing the petitioner to pay

deficit Court fee u/s 37(1) of the Act is liable to be set aside.

3. In support of his contention he relied on the following judgements;

I) Full Bench decision reported in Minor C.R.Ramaswami Ayyangar represented by his mother and next friend Lakshmi Ammal v. C.S.

Rangachariar and Ors. 1951 LW 11

If the words of Section 7(iv)(b) are to be given their ordinary meaning they cannot apply to a suit for partition by a member of a joint family who is

still in joint possession. It follows that I consider that the majority decision in Rangiah Chetty V. Subramania Chetty (1), is erroneous and should be

overruled. In these circumstances, the only provision in the Court fees Act which is applicable is Article 17-B of Schedule II and in stamping his

general relief under this provision the plaintiff has acted rightly.

I am unable to accept the plaintiff's contention that he should not be called upon to pay court-fees in respect of any of the transactions which he

challenges because he has not asked for specific relief in respect of them. His plaint challenges the validity of transactions entered into by his father

as manager of the family, and particulars of these transactions have been supplied. The plaintiff must pay court-fees in accordance with the relief

which he is actually seeking. He cannot be allowed to evade payment by omitting to ask for relief when the success of his suit depends on relief

being granted to him. The Court must look at the real nature of the suit and decide what the plaintiff is asking for. In this case he is asking for

possession of his share in the estate to be calculated after certain transactions have been set aside. Mr.V.V.Srinivasa Iyengar has rightly conceded

that if it is necessary for the plaintiff to ask for relief in respect of any of the transactions he must pay extra court-fee. The plaintiff is in effect asking

in respect of alienations where possession has passed to the alienees that they be set aside and that he be placed in possession of his share of the

properties alienated. In respect of these transactions the plaintiff clearly has to stamp his relief in accordance with the provisions of Section 7(v).

This will apply to item Nos.4, 11 and 14 of the table set out above....

...The same principle has been distinctly laid down by the Privy Council in *Bijoy Gopal Mukherjee v. Krishna Mahishi Debi* (1) where their

Lordships point out the jural basis underlying such transactions. In that case the reversioner sued for a declaration that a lease granted by the

widow of the last male-owner was not binding on him and for khas possession. It was objected that the omission to set aside the lease by a suit

instituted within the time limited by Article 91 of the Indian Limitation Act was fatal to the suit. The following observations which are equally

applicable to a father or manager of a joint family are apposite....

... It follows that in my opinion the plaintiff cannot be called upon to pay any additional court-fee in respect of the transactions challenged other

than the transactions described in items Nos.4,9, 10, 11 and 14. It will be for the respective defendants to establish their right to rank as creditors

in the other transactions when the account is taken. Neither the plaintiff be called upon to pay a separate court-fee in respect of his prayer for the

appointment of a receiver. This relief is entirely of an interlocutory character....

From the above said judgment it is clear that in a suit for partition of joint family properties, where the plaintiffs is in joint possession with the other

coparceners, is governed by Article 17-B of Schedule II of Madras Court-Fees Amendment Act 1922 (in Short 'Court Fees Act') and not by

Section 7(iv)(b). The applicability of Section 7(iv)(b) of Act 1870 is limited to a case where member suing is not in joint possession. The Section

7(iv)(b) of Act 1870 is equivalent to Section 37(1) of the Act.

ii) *Rathna Mudali and Ors. v. Ajudi venatesa Mudali and Ors.* 1951(1) MLJ 461

The plaintiffs paid a fixed Court-fee of Rs.100 under Article 17-B of the second schedule of the Court-Fees Act which of course should be the

proper article applicable if the plaintiffs were in possession of the joint family properties actually or constructively. The Official Receiver did not

contest the position that the Plaintiffs and Defendants 1 and 2 should be regarded as members of a joint undivided Hindu family. Indeed he claimed

that that being the position he was entitled to sell the properties under the Hindu Law for discharging proper debts. The Subordinate Judge has

however held that there was no proof that the Plaintiffs were in possession of the properties along with the Official Receiver and therefore directed

the plaintiffs to pay court-fee as in a suit for ejectment u/s 7, clause(v) of the Court-fees Act. In my opinion this is wrong. The effect of the

insolvency is not to put an end to the joint possession of the coparceners and whatever the rights of Official Receiver might be, the coparceners

must be deemed to be in possession atleast constructively of all the joint family properties. In this view the court-fee paid by the Plaintiffs must be

held to be correct and the order of the lower Court must be reversed. There will be no order as to costs in this revision petition as the objection as

regards court-fee was not taken by the Official Receiver.

In this case, the suit was filed by coparcener for partition of joint family property. Some members of the coparcenery were adjudicated insolvents,

the official receiver was in possession of the property who was authorised to sell the properties. In a dispute as to whether Court fee paid by the

plaintiffs under Article 17-B was valid or not, this Court held that the Court fee paid under Article 17-B is valid.

iii) In addition to the above decision, he relied on the judgment reported in Lakshmi Ammal v. K.M. Madhavakrishnan and Ors., AIR 1978 SC

1607 it has been held as follows:

`2.It is unfortunate that long years have been spent by the courts below on a combat between two parties on the question of court-fee, leaving the

real issues to be fought between them to come up leisurely. Two things have to be made clear. Courts should be anxious to grapple with the real

issues and not spend their energies on peripheral ones. Secondly, court-fee, if it seriously restricts the rights of a person to seek his remedies in

courts of justice, should be strictly construed. After all access to justice is the basis of the legal system. In that view, where there is a doubt

reasonable, of course, the benefit must go to him who says that the lesser court fee alone be paid.

3. In this particular case there is hardly any difficulty in holding that the plaintiff in para 14 of the plaint has clearly alleged that she is in joint

possession and is seeking partition and separate possession of her half-share in the suit properties as heir of deceased Paramayee. Obviously, the

court-fee that is payable is as she has claimed, namely u/s 37(1) which

corresponds to Article 17(B) of the Central Act, which is the predecessor legislation on the subject. We allow the appeal and send the case back to the trial Court and direct that court to proceed with the suit expeditiously. We make it clear that our decision on the question of court-fee does not have any implications on the merits, including the validity of otherwise of the Will. No costs.

In the above decision, it has been held that Section 37(2) of the Act corresponds to Article 17-B of the Court Fees Act. It has been further held

that when plaintiff alleging that he is in joint possession and seeking partition and separate possession of his/her share court-fee is payable u/s 37(2)

of the Act. It is relevant to note that in the said judgment the Hon''ble Supreme Court observed that the Court should be anxious to grapple with

the real issues and not spend their energies on peripheral ones. Secondly, Court-fee, if it seriously restricts the rights of a person to seek his

remedies in Courts of justice, should be strictly construed. In that view, where there is a doubt reasonable, of course, the benefit must go to him

who says that the lesser court fee alone be paid.

iv) Neelavathi and Others Vs. N. Natarajan and Others, , wherein it has been held as follows:

Section 37 of the Tamil Nadu Court Fees and Suits Valuation Act relates to Partition Suits. Section 37 provides as follows:-

37(1) In a suit for partition and separate possession of a share of joint family property or of property owned, jointly or in common, by a plaintiff

who has been excluded from possession of such property, fee shall be computed on the market value of the plaintiff's share.

37(2) In a suit for partition and separate possession of joint family property or property owned, jointly or in common by a plaintiff who is in joint

possession of such property, fee shall be paid at the rates prescribed.

It will be seen that the Court Fee is payable u/s 37(1) if the plaintiff is ""excluded"" from possession of the property. The plaintiffs who are sisters of

the defendants, claimed to be members of the joint family, and prayed for partition alleging that they are in joint possession. Under the proviso to

Section 6 of the Hindu Succession Act, 1956 (Act 30 of 1956) the plaintiffs being the daughters of the male Hindi who died after the

commencement of the Act, having at the time of the death an interest in the

mitakshara coparcenary property, acquired an interest by devolution

under the Act. It is not in dispute that the plaintiffs are entitled to a share. The property to which the plaintiffs are entitled is undivided `joint family

property" though not in the strict sense of the term. The general principle of law is that in the case of co-owners, the possession of one is in law

possession of all, unless ouster or exclusion is proved. To continue to be in joint possession in law, it is not necessary that the plaintiff should be in

actual possession of the whole or part of the property. Equally it is not necessary that he should be getting a share or some income from the

property. So long as his right to a share and the nature of the property as joint is not disputed the law presumes that he is in joint possession unless

he is excluded from such possession. Before the plaintiff should be called upon to pay court fee u/s 37(1) of the Act on the ground that they had

been excluded from possession, it is necessary that on a reading of the plaint, there should be a clear and specific averment in the plaint that they

had been ""excluded"" from joint possession to which they are entitled to in law. The averments in the plaint that the plaintiff could not remain in joint

possession as he was not given any income from the joint family property would not amount to his exclusion from possession. We are unable to

read into the plaint a clear and specific admission that the plaintiff had been excluded from possession.

In the above said judgment, it was laid down that the Court fee must be construed in the light of the averments in the plaint and its decision cannot

be influenced either by the pleas in the written statement or by the final decision of the suit on merits. All the material allegations contained in the

plaint should be construed and taken as a whole. Before the plaintiff could be called upon to pay the Court fee u/s 37(1) of the Act on the ground

that they had been excluded from possession, it is necessary that on a reading of the plaint, there should be a clear and specific averments in the

plaint that they have been excluded from joint possession to which they are entitled to in law. The averments in the plaint that the plaintiff could not

remain in joint possession as he was not given any income from the joint family property would not amount to his exclusion from possession.

4. Though this Court ordered notice to the respondents, which was served on them and their names also printed, none represented them.

5. Before dealing with the case on hand, it would be relevant to extract Section 37 of the Act:

37. Partition suits-(1) In a suit for partition and separate possession of share joint family property or of property owned, jointly or in common, by

a plaintiff who has been excluded from possession of such property, fee shall be computed on the market value of the plaintiff's share.

[2] In a suit for partition and separate possession of joint family property or property owned, jointly or in common, by a plaintiff who is in joint

possession of such property, fee shall be paid at the following rates:-

When the plaint is presented to -

(i) a District Munsif's Court

Rupees one hundred

(ii) the City Civil Court, Chennai or a Sub-Court or a District Court.

Rupees one hundred, if the plaintiff's share is rupees thirty thousand or less; rupees five hundred, if it is above rupees thirty thousand but below

rupees one lakh; and rupees seven hundred and fifty, if the value is rupees one lakh and above.

(iii) The High Court

Rupees one thousand

(3) Where, in a suit falling under sub-section(1) or sub-section(2), a defendant claims partition and separate possession of his share of the

property, fee shall be payable on his written statement computed on half the market value of his share or at half the rates specified in sub-

section(2), according as such defendant has been excluded from possession or is in joint possession.

(4) Where, in a suit falling under sub-section(1) or sub-section(2), the plaintiff or the defendant seeks cancellation of decree or other document of

the nature specified in Section 40, separate fee shall be payable on the relief of cancellation in the manner specified in that section.

6. In the case on hand the petitioners herein have alleged that they are co-owners and they are in joint possession of the suit property. Applying the

said judgments mentioned supra, this Court is of the prima facie view that the Court fee paid by the petitioners u/s 37(2) of the Act is right and the

impugned order is set aside. However, it is open to the trial Court to frame

necessary issues as to whether the petitioners herein are liable to pay stamp duty u/s 37(2) or 37(1) of the Act and decide the same along with the other issues while disposing of the suit on merits. The CRP is disposed of on the above terms.