

(1980) 08 MAD CK 0027
In the Madras High Court
Case No : C.R.P. No. 824 of 1979

S.V. Muthu

APPELLANT

Vs

Veerammal

RESPONDENT

Date of Decision : 19-08-1980

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 18(2)
Tamil Nadu Court Fees and Suits Valuation Act, 1955 — Section 37(2), 37(3)

Citation : AIR 1981 Mad 307 : (1981) 94 LW 300

Hon'ble Judges : Ratnam, J

Bench : Single Bench

Advocate : N. Varadarajan, for the Appellant; N.R. Chandran, for Govt. Pleader, for the Respondent

Judgement

1. Defendants 1 to 4 in O. S, No. 213 of 1968. Sub, Court, Coimbatore, are the petitioners in this civil revision petition which is directed against

the order dismissing an application filed by them praying for the issue of a cheque in a sum of Rs. 13 259-23 in favour of their counsel. The suit, O.

S. No. 213 of 1968 was filed by the respondent herein for partition and separate possession of their share in the properties and on 4-8-1971, a

preliminary decree was passed against which an appeal was filed to this court in A. S. No. 646 of 1972, which also stood dismissed. The

petitioners claim that as per clauses (8) and (9) of the preliminary decree, they are entitled to a sum of Rs. 14588-30 being the dividend due to the

father of the petitioners from the 14th defendant in the suit who had deposited a sum of Rs. 13704-60 into court as per clauses (8) and (9) of the

preliminary decree. The petitioners claim that out of this amount they are entitled to withdraw a sum of Rs. 13259-23 and that the respondents are

entitled to withdraw a sum of Rs. 445-37. It is on this ground that the petitioners filed I. A. 472 of 1978 in O. S. No. 213 of 1968, praying for the issue of a cheque in favour of their counsel.

2. The respondents resisted the application contending that the petitioners have not paid the court-fee for partition and separate possession and hence, they are not entitled to ask for their share in the amount. It was also contended by them that the petitioners have to render accounts to them as well as to defendants 5 and 6 in the suit regarding the income derived by the petitioners from their share in accordance with clause 36 of the preliminary decree and, therefore, the application has to be dismissed.

3. The learned Subordinate Judge, Coimbatore, held that though the preliminary decree had been passed on 4-8-1971, yet, no steps whatever have been taken to pass a final decree and that no prejudice will be caused to the respondents, if payment out of the cheque is ordered. But, however, the learned Subordinate Judge held that the petitioners are entitled to withdraw the amount subject to payment of requisite court-fee. Ultimately, the court directed the payment of a sum of Rs. 13259-23 in favour of the counsel for the petitioners, subject to the payment of requisite court-fee for this amount. It is the correctness of this order that is challenged in this civil revision.

4. The learned counsel for the petitioners contended that no court-fee is payable at all since, according to him, on the separation of the share of the respondents, the share of the petitioners also gets ascertained and separated and that there is no need, therefore, for the petitioners to pay court-fee on their share and pray for its separation as well. On the other hand, Mr. N. R. Chandran, learned Addl. Government Pleader (II), contends that whenever the defendants ask for separation of their share of the properties, the court-fee is payable and such separation can also be sought for after the passing of the preliminary decree; but only so long as the final decree proceedings are pending and in the present case, the petitioners, after preliminary decree, are seeking a separation of their share and, therefore, the court fee is payable. The relevant section that is applicable to the present case is Section 37 of the Tamil Nadu Court-Fees and Suits Valuation Act, 1955 (hereinafter referred to as the Act). The section reads as follows:-

37. Partition suits- (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.

(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 Munsifs

Court

(it) the City Civil Court,

Madras or a Sub.

Court or a District

CourtRupees thirty If the value

of plaintiff's share is Rs. 9000 or less:

Rupees one hundred if

the value is above

Rs. 5000 but below Rs.

10000; and

Rupees two hundred If

the value is Rs. 10000

and above

(lit) the High Court Rupees three hundred.

3. Where in a suit falling under subsec. (1) or sub-sec. (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 rate specified in sub-sec. (2), according as such defendant has been excluded from

possession or is in joint possession.

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

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

5. Section 37(3) indicates that if, at the time of filing the written statement, the defendant claims partition and separate possession of his share of the property, then the court-fee becomes payable immediately, computed one-half the market value of his share or at half the rates specified in Sec. 37(2) of the Act depending upon whether such defendant had been excluded from possession or is in joint possession. I, is this provision which had been taken advantage of by defendants 5 and 6 in the suit, who had prayed for in their written statement the separation of their shares and had also paid court-fee thereon and the preliminary decree declared their shares also. S. 37(3) of the Act does not, however, provide for a case to enable a defendant after the passing of the preliminary decree to ask for a separation of his share; but when all the parties are before court and the shares have not undergone any change, as in the present case, and the matter has not proceeded to a final decree, there cannot be any serious objection in principle, if a defendant, even after passing of the preliminary decree is permitted to seek a separation of his share of the properties by payment of court-fee. The contention of the learned counsel for the petitioners that no court fee at all need be paid cannot be accepted as the court separated on a request by the defendant their share of the properties as well. It appears to me that Section 37(3) of the Act would apply even with reference to a case where a defendant seeks the partition and separate possession of his share of the properties after the passing of the preliminary decree, but only so long as the final decree proceedings are pending. Indeed in *Varada Appalanaidu Vs. Bodu Annamnaidu and Others*, Bench of this Court consisting of Ramesam and Devadoss JJ. held that separation of the share could be effected in execution as well. In that case, in a suit by one of three reversioners where the other two were made defendants 2 and 3 for a declaration that all the three were entitled to the suit property as reversioners and for partition and the recovery of one third share of the suit property, an issue was raised whether plaintiff, defendants 2 and 3 were reversioners and the issue was decided in plaintiff's favour and the suit was decreed. The 3rd defendant filed another suit for his one third share wherein the first defendant contended that the suit was unnecessary in view of decree in plaintiff's suit and in the course of execution, the third defendant applied for partition. It was held that it was not open to the first defendant to contend that the third defendant was

not entitled to ask for a decree for his share on payment of court-fee as in a partition decree and especially so in view of his objection in the suit by

the third defendant. In that case also, the final decree proceedings were pending and the Bench held that it was open to the 3rd defendant to ask

for a decree for his share on payment of court-fee. It must be remembered that this decision had been rendered at a time when the Tamil Nadu

Court-Fees and Suits Valuation Act 1955 was not in force, especially See. 37 thereof. In *Insane Nil Govinda Misra*, represented by guardian wife

Khanta Mayi Deby and After his death his Sole Heiress and Legal Representative *Kanta Mayi Deby and Others Vs. Sm. Rukmini Deby Misra*

and Others, , a Division Bench of the Calcutta High Court held that a cosharer, be he or she a plaintiff or defendant in a suit for, partition, is entitled

to claim a separatL4,,,,allotment at any stage before the final decree and that there can be partition by metes and bounds even of those properties

in which the plaintiff has no share but one or the other defendant claims separate allotment and a separate suit need not be brought for this purpose.

In *Smt. Bittan Devi v. Rudra Sen Bajpat*, AIR 1966 All 601, relied on by Mr. N. R. Chandran, it has been held that when in a suit for partition, the

defendants apply for the preparation of final decree by separation of their share, they desire to be treated as co-plaintiffs and allotted their share

separately and that plaintiffs and also defendants standing in the category of plaintiffs must pay court-fee before their prayer can be granted. It has

also been further pointed out that stamp duty, if any, payable at the time of the passing of the final decree shall also be payable by them. Referring

to the provisions of Order 20, Rule 18 (2) C.P.C., it has been held that the court of law generally lay down in the preliminary decree the plaintiff's

share or rights in the property; but where the defendants desire that their share or interest be also declared, the preliminary decree should contain

such a declaration also. If the defendants' rights have not been declared in the preliminary decree, the aggrieved party can challenge the decree in

appeal or can apply for review. But once the preliminary decree contains a declaration as to the defendants' share, they can, even after passing of

the preliminary decree, apply for and have their share partitioned on payment of court-fee etc., as may be necessary under the law. Indeed, the

Privy Council has pointed out in *Lachmi Narain Marwary v. Balmukund Marwary*, AIR 1924 PC 198 that after decree it is open to any party to a

suit to whose interest it is that further proceedings be taken to initiate the supplementary proceedings, but in the ordinary case it is the plaintiff who moves. If the preliminary decree already passed does not contain any declaration as to the rights of the defendants, their application for partition or separation of their share shall not be maintainable till they have the preliminary decree suitably modified, but when once the preliminary decree contains a declaration as to the defendant's share, they can, even after the passing of the preliminary decree, take steps for the actual separation of their share. Indeed, in the instant case, no such steps have been taken by the petitioners to modify the preliminary decree in any manner for having their shares also declared and until such time, it is not open to the petitioners to claim that they are entitled to the amount in deposit. It is undoubtedly open to the petitioners to take such steps as they may be advised to have the preliminary decree amended in such a manner as to include a declaration of their rights as regards their share in the properties as well and only then they can seek payment of the amount in deposit. Without doing so, on the basis of the preliminary decree as it now stands, the petitioners cannot seek to withdraw the amount in court deposit on the ground that they are entitled to the same. The result is, the refusal of the court below to direct payment out, is, therefore, correct, though for different reasons. The civil revision petition fails and is dismissed. No costs.

6. The dismissal of this civil revision petition does not preclude the petitioners from taking any steps as may be open to them before the court below for a declaration of their share of the properties by a supplementary preliminary decree, if need be, and on payment of the necessary court-fee u/s 37(3), of the Tamil Nadu Court-Fees and Suits Valuation Act, 1955.

7. Revision dismissed.