

(1949) 04 PAT CK 0005
In the Patna High Court
Case No : Civil Revision No. 102 of 1949

Tejpal Saraogi and Others

APPELLANT

Vs

Mahadeo Lal and Others

RESPONDENT

Date of Decision : 26-04-1949

Acts Referred:

Court Fees Act, 1870 — Article 17, 7

Citation : AIR 1951 Patna 526

Hon'ble Judges : Nageshwar Prasad, J; Das, J

Bench : Division Bench

Advocate : Sarjoo Prasad and Krishna Prakash Sinha, for the Appellant; Govt. Pleader, Shambhu Prasad Singh, Thakur A.D. Sinha, Balram K. Sinha and Rameshwar Prasad Sinha, for the Respondent

Judgement

Das, J.—This appln. in revn. raises the question of court-fees payable on the plaint--namely if court-fees are payable under Article 17 (vi) of Schedule II Court-fees Act, as in a simple suit for partition or ad valorem court-fees as in a suit for title, where a declaration of title with a consequential relief is asked for.

2. The peters, before us were the pltfs. in the Ct. below. The facts givtg rise to the appln. are the following. The petnrs. brought the suit, which was in form a suit for partition only, in respect of two houses situate in the town of Siwan. The petnrs. alleged that their share of the two houses was to the extent of 12 annas & the share of deft. 1, who was the karta of the joint family of defts. 1 to 8, was to the extent of 4 annas only. In para. 8 of the plaint the petnrs. stated that

"deft. 1, with an ulterior motive, executed a fictitious sale-deed in favour of deft. 8 his wife, without receipt of any consideration, & later got a colourable sale deed in favour of deft. 9 & a colourable zarpeshgi deed in favour of deft. 10 & another colourable sale-deed in favour of deft. 11--all without any consideration executed either by deft. 8 or by deft. 1 or by both."

It was further averred that the aforesaid sale deeds & zarpeshgi deed executed

by defts. 1 & 8 in favour of defts. 9 to 11 were without consideration & of the nature of sham transactions. It may be observed here that defts. 9 to 11 were strangers to both families & were not co-sharers or co-owners against whom partition could be claimed. In para. 9 the petnrs. stated that they did not want to keep the two houses joint & requested the defts. to partition the two houses. The defts. did not agree thereupon, the petnrs. brought the suit, & the main relief which the petnrs. claimed was put in the following form :

"A decree for partition & separation of pltfs. three-fourth share in the properties described below & separate possession over the same be passed in favour of the pltfg."

3. The question that arose for consideration by the learned Subordinate Judge, in whose Ct. the suit was instituted by the aforesaid plaintiff, was the true nature of the suit: that is, whether the suit was a pure & simple suit for partition of the two houses as between co-owners, or a suit for a declaration of title as against strangers in the guise of a suit for partition. The learned Subordinate Judge held, on a consideration of the plaintiff, that so far as the strangers were concerned, the suit was really a suit for title, namely, a suit for a declaration of title & possession. In that view of the matter he directed the petnrs. to pay ad valorem court-fees. It is against this order of the learned Subordinate Judge that the present application in revision is directed.

4. Mr. Sarjoo Prasad appearing for the petitioners. has contended before us that the suit was really a suit for partition, pure & simple; because if one co-owner made certain alienations, those alienations were not binding on the petitioners. & the petitioners. could get the only relief which they had asked for, namely, partition, without any adjudication as to whether the transfers in favour of the strangers made by one of the co-owners were genuine or not. In the alternative he has contended that in order to get the relief of partition, a finding as to the transfers in favour of the strangers might be incidentally necessary, but such a finding cannot be called a relief by way of a declaration in its true sense. Learned counsel has taken us through a large number of decisions In the F. B. decision of this Ct. of *Ramkhelawan Sahu Vs. Bir Surendra Sahi and Others*, what is really meant by a "declaration" in its true sense has been explained, & it is pointed out that a mere finding which may be necessary in order to give relief to a party is not necessary a declaration in its true sense. Mr. Sarjoo Prasad has drawn pointed attention to the observations made at the bottom of p. 783 pp. 784 & 785 of the report, particularly the following observations occurring at p 784 of the report:

"The distinction between the remedy sought & the finding of fact necessary to justify the granting of that remedy may be simply tested by considering whether the plaintiff obtaining an order for possession but having been refused a formal "declaration" in the decree could come to the appellate Ct. with a complaint that he had not received the whole of the remedy for which he had asked. ... In every suit for possession the plaintiff cannot succeed unless he proves the facts necessary

to establish his title, but the real remedy which he seeks is a decree for delivery of possession "

Reference has also been made to the D. B. decision in Ramautar Sao Vs. Ram Gobind Sao and Others, where the following principles were laid down : (1) So far as a suit purporting to be for partition is actually in the nature of a title suit, ad valorem court-fees are payable, whether the suit is regarded as governed by Section 7(iv)(c), 7(iii) or 7(v), Court-fees Act, 1870; (2) caution must be observed, however, so as not to import into the plaint anything which it does not really contain either actually or by necessary implication ; in construing a plaint the Court must take it as it is not as it ought to have been; a relief not asked for cannot be imported so as to charge Court-fee thereon ; (3) a distinction must be drawn between cases where it is necessary for the pltf to get a document declared void and cancelled before he can get relief, and cases where the pltf. can obtain his relief without any such declaration and cancellation upon a mere finding that the document does not affect him ; that is to say, the Court must distinguish between avoidable documents wholly void documents and between declarations in the true sense and declarations so called, which are merely the findings of fact necessary to give the pltf. relief

5. Applying the aforesaid principles, the contention of Mr. Sarjoo Prasad is that the suit which, the petnrs. had brought was, in substance, a suit for partition only, and in order to give the relief of partition, which was nothing more than a change in the mode of enjoyment of the two houses, it was not necessary for the petnrs. to obtain any declaration as to the transfers alleged to have been made by one of the co-owners. It is pointed out that the same principles have been reiterated in the latest F. B. decision of this Court in Mt. Rupia Vs. Bhatu Mahton and Others, . Mr. Sarjoo Prasad has also drawn our attention to a decision of their Lordships of the Judicial Committee in Bijoy Gopal v. Krishna Mahisi Debi, 304 Cal 329 : 34 I. A. 87 PC which was a suit by a reversioner on the death of a Hindu widow to recover immovable property of her husband, of which she was in possession for a widow's estate as his heir and of which she had granted a lease for term extending beyond her own life. It was there pointed out that the allegation made by the widow was voidable at the election of the reversionary heir who might affirm it or treat it as a nullity without the intervention of any Court there being nothing to set aside or cancel as a condition precedent to his right of action

6. The principles laid down in the aforesaid decisions are not disputed by Mr. Lalnarain Sinha, Govt. Pleader, appearing on behalf of Govt. He contends, however, that those principles do not apply in the present case. Mr. Lalnarain Sinha contends that the suit which the petnrs. had brought might have been a suit for partition, pure and simple, if the stranger-alienees had not been made parties, and if the petnrs had not asked for an adjudication to displace the title based on the transfers made in their favour.

7. So far as the stranger-alienees are concerned, it is clear that the petnrs. do

not accept them as co-owners or co-sharers against whom the relief of partition can be claimed. It cannot, therefore, be said that any incidental finding of fact is necessary in order to give the main relief which the petnrs. claim, so far as the stranger-alienees are concerned. Either the petnrs. are claiming no adjudication against the stranger, alienees or they are claiming an adjudication to displace their title. As there can be no relief "of partition against the strangers, the only relief claimed against them is the displacement of their title based on the transfers made in their favour. That would undoubtedly be an independent declaration of title not necessarily connected with the relief of partition. If no relief is claimed against the strangers, then they should not have been made parties to the litigation. It seems to me that so far as the stranger-defts. are concerned, the suit is, in substance, a suit for a declaration of title, & the learned Subordinate Judge rightly held that the suit was a suit for title in the guise of a partition suit. Mr. Sarjoo Prasad has placed great reliance on the F. B. decision of the Madras High Court in *Ramaswami v. Rangachariar*, I. L. R. (1940) 259 : A. I. R. 1940 Mad. 113 . That was a case in which the pltf. a Hindu minor, sued through his mother as next friend for partition of the properties of the joint family consisting of himself, his father and his three brothers and for possession of his one-fifth share therein; besides his father and his three brothers, the pltf. joined as defts. several other persons (strangers to the family) either as alienees of family properties or as creditors of the family. The Pltf. stated that his father's transections were not binding on the family, but he did not in terms ask for the setting aside of the alienations of family properties, or for declarations that his father's other transactions were unenforceable against the estate. His prayers were for : (i) an account of the movable and immovable joint family properties, (ii) partition by metes and bounds of his one-fifth share, (iii) appointment of a receiver to manage the properties and collect the rents and income till the disposal of the suit, (iv) costs of the suit, and (v) such further and necessary reliefs as in the circumstances might be considered necessary and proper. It was held by the F. B. that in respect of the general relief for partition the provision which applied was Article 17-B of Sch II, Court-fees Act, as amended in Madras (corresponding to Article 17 (vi), Court-fees Act as applied in Bihar). In respect of the alienations, it was held that the suit was one for possession and Section 7(v), Court-fees Act applied, inasmuch as possession had passed to the alienees. In respect of certain decrees passed against the pltf. in suits in which he had been impleaded as a party, it was held that the fee prescribed by Section 7(iv-A), Court-fees Act as amended in Madras was payable. In regard to the other transactions of the father impugned by the pltf., it was held by the majority of Judges, Abdur Rahman J. dissenting, that the pltf. could not be required to pay a separate court-fee as regards any of them, even though he had impleaded the several creditors or alienees, and even if the plaint had contained prayers for declarations or cancellations in respect of that said transactions. It was observed that the Court was bound as between the members of the family to decide which were the debts binding on the family before directing a division, whether the several persons interested in supporting the transactions were before the Court

or not. It was observed that the fact that the pltf. impleaded them would not alter the position. Relying on the aforesaid decision, Mr. Sarjoo Prasad has contended that the petnrs. having alleged in the plaint that the co-owners were in possession in spite of the alienations, there could be no question of paying court-fees for setting aside the alienations because it was not necessary for the petnrs. to ask for, nor did they actually ask for, setting aside those alienations. It is further argued that the mere fact that the stranger alienees have been made parties would not alter the position, as was held in the case which their Lordships had before them in Ramaswami's case, ILR (1940) Mad 259 : AIR 1940 Mad. 113 . The distinction, however, between the case which their Lordships had before them and the case before us is this in the case which their Lordships had before them it was observed that whether-the strangers were before the Court or not, the Court was bound as between the members of the family to decide which were the debts binding on the family before directing a division. Therefore, it was pointed out that under the provisions of Order 1, R, 10 (2), Civil P. C., the strangers could be added to the suit in order to enable the Court to adjudicate effectually and completely upon and settle all questions involved in the suit. In the case before us if the petnrs. had brought a simple suit for partition, it would have been unnecessary to determine the validity or otherwise of the transfers alleged to have been made by one of the co-owners, and the strangers could not have been added as parties under Order 1, Rule 10 (a), Civil P. C. The petnrs., however, have not only added those strangers as parties, but have really claimed in the plaint that an adjudication should be made to the effect that the transfers made in favour of the strangers were transfers without consideration and of a sham character. I do not think that the principle laid down in the decision of Ramaswami's case, ILR (1940) Mad. 259 : AIR 1940 Mad 113) will apply to the present case. The suit which the petnrs. had brought was really of a composite nature: so far as the co-owners were concerned, it was a suit for partition ; but so far as the strangers were concerned, the suit was really a suit for title in which it was claimed that the transfers made in favour of the strangers by some of the co-owners were without consideration, and, therefore, of a sham nature. That being the position, I do not think the learned" Subordinate Judge was wrong in his view that the suit was really a suit for title in the guise of a partition suit in respect of the two houses in question. The decisions on which Mr. Sarjoo Prasad has relied, in which a distinction was-drawn between a finding of fact necessary to give relief to a party and a declaration in its true and; proper sense, do not seem to me to be applicable to this case where as against strangers to the family, the only relief that can be and is claimed, is an adjudication displacing their title to the houses. At the risk of repetition, I must again observe that as against the strangers no partition-could be claimed. What is termed a "finding of fact" is really the main relief of title claimed against the strangers. In that view of the matter, I am of the opinion that the learned Subordinate Judge was right in his view that the suit was a suit for which ad valorem court-fees had to be paid.

8. There is a small inaccuracy in the calculation made by the stamp reporter to

which, I think, the attention of the learned Subordinate Judge must be drawn. The stamp reporter had made a calculation on the basis that the petnrs. claimed two-thirds interest in the two houses. As a matter of fact, the petnrs. were claiming three-fourths interest in the two houses.

9. I must also make it clear that it is open to the petnrs. to amend the pleadings and strike out such parties as may be considered unnecessary in a suit for partition, pure and simple. If the petnrs. amend their pleadings and strike out unnecessary parties, the learned Subordinate Judge will have to consider the question of court-fees afresh.

10. For the reasons given above, I do not think there are any grounds for interference, and the application must be dismissed with costs. Hearing fee, two gold mohurs.

Nageshwar Prasad, J.

11. I agree.