

(1964) 08 GUJ CK 0002

In the Gujarat High Court

Case No : Civil Revision Application No. 842 of 1963

Thakkar Kalyanji and Others

APPELLANT

Vs

Thakkar Liladhar Chhanganlal and Others

RESPONDENT

Date of Decision : 12-08-1964

Acts Referred:

Bombay Court Fees Act, 1959 — Article 23, 5, 6

Citation : AIR 1965 Guj 204 : (1965) 6 GLR 44

Hon'ble Judges : P.N. Bhagwati, J; J.B. Mehta, J

Bench : Division Bench

Advocate : R.C. Mankad, for the Appellant; A.D. Desai, Asst. Govt Pleader, for the Respondent

Judgement

Mehta, J.

(1) This revision application is against the decision of the Taxing Officer as to the correct court fee payable on a memorandum of appeal filed by the mortgage against a decree in which it was declared that the mortgages were not binding on the 1/8th share of the plaintiffs.

(2) The short facts which have given rise to this petition are as follows: --

(3) The plaintiffs are the heirs of one deceased Liladhar Chhaganlal. The father of the deceased Liladhar was one Chhaganlal. Sunderji who left behind him seven sons and one widow and so the share of the plaintiffs' father was 1/8th in the properties left by the said Chhaganlal Sunderji. The other brothers of the deceased Liladhar were the original defendants 1 to 6. Those brothers had executed three mortgages Exs. 46 to 48 of different suit properties to secure different amounts. Defendant No. 1 had executed the said mortgages also as a guardian behalf of the minor plaintiffs. The said mortgages were in favour of then original defendants Nos. 13, 14, and 15 respectively who are the present petitioners. The plaintiffs who were the heirs of the said deceased Liladhar had filed a suit partition against the defendants Nos. 1 to 6 and others and they also

prayed for a declaration that the said mortgage Exs. 46 to 48 in favour of the present petitioners, who were defendants Nos. 13 to 15, were not binding on the plaintiffs' 1/8th share in the suit properties. The trial Court gave a declaration that the mortgage deeds Exs. 46 to 48 were not binding on the 1/8th share of the plaintiffs and gave other reliefs. Defendants Nos. 13 to 15, therefore, filed the appeal and on the memorandum of appeal a court fee stamp of Rs.36 was paid. The matter having been referred to the Taxing Officer, he was of the view that Article 5 of Schedule I applied to such a memorandum of appeal in a suit, which was one for setting the alienation, and he accordingly ordered the appellants' advocate to state the valuation of 1/8th share of the plaintiffs. The petitioners have, therefore, filed the present revision Application against the said order.

(4) In order to determine the correct court fees payable on this memorandum of appeal in question, we must first consider the charging section 5 of the Bombay court fees Act, 1959, hereinafter referred to as "the Act", which provides that no document of any the kinds specified as chargeable in the first or second Schedule, annexed to this Act, shall be exhibited or recorded in any Court of Justice. . . . unless in respect of such document there has been paid a fee of amount not less than the proper fee for such document. We must, therefore, turn to Schedules I and II to find out the fees payable on the present memorandum of appeal. The Taxing Officer has relied on Article 5 of Schedule I which deals with a plaint in a suit, application of petition including memorandum of appeal, to set aside, an alienation to which the plaintiff, applicant or appellant, as the case may be, was a party, either directly or through a legal guardian than de facto or ad hoc guardian, manager, partner or court and the corresponding fee prescribed is on the extent of the value of the alienation to be set aside according to the scale prescribed under Article I.

(5) Now before this Article would be applicable it must be kept in mind that a suit or a memorandum of appeal must be one (1) to set aside the alienation and (2) to such alienation the plaintiff or the appellant, as the case may be, must be a party either directly or through the legal guardian or manager. In the present case so far as the appellants are concerned, they are not asking for setting aside any alienation. Their only claim in this appeal is that the mortgage security may extend also to the 1/8th share of the plaintiffs. such a suit for a declaration as only one of the reliefs in a general suit for a declaration as only one of the reliefs in a general suit for partition could not be considered to be a suit for setting aside the alienation. besides, the present plaintiffs were not parties to the mortgages in question through their legal guardians or the manager. Defendant No. 1 had signed the mortgages in question as a guardian but he is not shown to be the legal guardian of the minor plaintiffs and he has not purported to act as a manager of the joint family. Therefore, in any view of the matter, Article 5 would be entirely out of question so far as the present appeal is concerned, even if we look into the character of the original suit of the plaintiffs.

(6) Article I of Schedule is a residuary Article which provides for a plaint or a memorandum of appeal not otherwise provided for in this Act or of cross objections for which ad valorem fees have been prescribed on the scale prescribed therein. That article would have application if there is no other specific provision in the Act for the fees payable in the present case. Mr.Mankad contended that Article 23 sub-clause (f) in Schedule II would govern the present case. That Article deals with a plaint petition or application including memorandum of appeal which is capable of being treated as a suit, in or any Civil Court not otherwise provided for and the subject matter of which is not capable of being estimated in money value. The fees prescribed for such a memorandum of appeal is a fixed of Rs. 30/-. This Article would apply to the present memorandum of appeal provided we do not find any other provision in the Act and provided the subject matter of the appeal is not capable of being estimated in money value, As far as the subject matter of this appeal is concerned, it is clearly as to extent of security which the mortgages have in respect of their debts. The dispute between the parties is only whether the said security under the mortgages in question extends to the plaintiff's share or not. Therefore, the subject matter in dispute in the appeal would be the worth of the security. Now it would be difficult to estimate the worth of such a security by reference to any fixed standard of valuation. It may be that ultimately the mortgages in question may not have to resort to any such security. The whole claim may be satisfied amicably or even without resort to the plaintiffs' share in question. Therefore, the subject matter of the present appeal viz., the value of the security in question is not capable of being estimated in money value. Mr.Desai, however, contended by finding out what was the mortgage debt. According to Mr.Desai, the plaintiffs secured the benefit by getting their property released from the burden off the mortgage debt by reason of this declaration. This would result in an equivalent monetary loss to the mortgages if the decree as if the decree stood as it is and was not set aside. We cannot agree with Mr. Desai that the extent of the monetary gain or loss to the mortgages is capable of ascertainment. The claim in the appeal is for getting a relief that their security extends to their property including the plaintiffs' 1/8th share as well. If the decree stands the mortgagees would not have their security extended to that particular share and if the decree is set aside the security will extend even to the share. So the result of the appeal one way or the other would result in either extending or diminishing the value of the security. It is impossible to say what would be the value of such a security in corresponding money value. In this connection we find a similar view expressed by the Calcutta High Court in *Dhirendra Nath De Vs. Naresh Chandra Ray and Others*, . In that case the trial Court had passed a decree for arrears of rent and the appeal was filed to have a charge declared on the 1/6th as per the contract. Their Lordships observed that even in spite of the refusal of the decree for declaration of a charge, the plaintiff might be able to get something in respect of the decree either amicably or by execution. The value of the relief he would get by the declaration of the charge would be the difference between the amount of the decree and what he would

have obtained even with out the assistance of a charge being declared. It was there held that it was impossible to ascertain what the plaintiff would be able to realise amicably or by execution without the assistance of a charge being declared and the necessary consequences must be that the relief he was seeing by declaration of a charge was incapable of valuation, the Bombay High Court in the case of Chhotalal Kalidas v. Laxmidas 60 Bom LR 587, at p. 593: (AIR 1959 Bom 5127 at p. 528 has also taken the same view. There the suit was one for a declaration that the auction sale held by the mortgage in exercise of the power of sale conferred by the mortgage was illegal and void. The trial Court held that the value of the suit was not merely the equity of redemption but the value of the whole property. It was held in that case that such a suit for a declaration that a sale was invalid and ineffective was not a suit to set aside an alienation. It was also held that there was no stand by references to which it was possible to value the subject-matter of the suit. The suit was held to be one in which it was not possible to estimate at a money value the subject-matter in dispute. Mr. Desai relied on the decision of the Madras High Court in re Vinaitheerthal Achi AIR 1942 Mad 152. In that case also there was a decree for the amount claimed but no charge was declared and in the appeal the appellant sought to get the charge on the assets in question, The learned Judge relying on the earlier full Bench decision in Kesavar Appu Ramkrishna Reddi v. Kotta Kota Reddi ILR 30 Mad 96 held that it could not be said that the relief was incapable of valuation. The assets had got money value and capable of valuation and as the plaintiff had valued the assets at Rs. 9500/- that was considered as the value of the subject-matter in dispute. Now it may be noted that in that case it has not been considered that the value of a security would be always difficult to estimate in view of the fact that it might not be necessary to resort to the security in question and the debt might be satisfied without resorting to the same. The decision in the Calcutta case Dhirendra Nath De Vs. Naresh Chandra Ray and Others, and the considerations made therein were not relied upon in that case. Further, in that case the learned Judge had also made it clear that where the relief for declaration was enough and the claim was one for a mere declaration as in the case of the question of priority between the two mortgages, but the relief would be incapable of valuation. In the present case also, the application have filed this appeal only so that the judgment against them by the trial Court granting the declaration to the plaintiffs might not operate as res judicata when subsequently the appellants seek to enforce the mortgage in question, The subject-matter in dispute in the present appeal would be only as to the extent of the security and the question would be one of mere declaration at this stage. We, therefore, agree with Mr. Mankad that the subject-matter of the present appeal is not capable of valuation.

(7) We have, therefore, to see whether there is any other provision in the Act which would govern the present case and thereby take it out from the ambit of Article 23 of clause (f) in schedule II. Mr. Desai for this purpose relied on S. 6(d) of the Act which provides that in suits for declaration in respect of ownership, or

nature of tenancy, title, tenure, right, lease, freedom for exemption from or non-liability to, attachment with or without sale or other attributes, of immovable property, such as a declaration that certain land is personal property of the Ruler of any former Indian state or public trust property or property of any class or community, one fourth of ad valorem fee leviable for a suit for possession on the basis of title of subject-matter, subject to a minimum fee of eighteen rupees and seventy five- naye paise. Mr. Desai contended that this clause is a general covering all declarations in respect of ownership or other rights of immovable property. He further contended that the declarations which were mentioned in the latter part of that clause after the words "such as a declaration that certain land is personal property of the Ruler of any former Indian State or public trust property or property of any class or community" were merely illustrative and they would not cut down the general import of the suit for declaration covered in the main clause. The words such as would be illustrative of the category which is referred to in the main clause, which would describe really the genus or the class which is spoken of in the main clause. They would be illustrative only of the particular clause but those words could not be rendered entirely nugatory or redundant. The nature of declaration contemplated in that clause must be of the same type and genus as the one mentioned in the subsequent part. The suit for declaration must be one where the question of ownership or title was in question and the clause would have no application to a suit of this character. Here he ownership of the plaintiff in that suit properties or the extent of that ownership viz., 1/8th share is not in dispute. The only question is whether the mortgage were binding on a particular share, which is the admitted property of the plaintiffs. Both the mortgage and the ownership of the plaintiff are admitted and are not in dispute and the only question is what is the extent of the mortgage security - whether it extends to the plaintiff share or it does not so extend. We must keep in mind that this clause provides for an ad valorem court-fees to the extent of 1/4th the fee leviable on a suit for possession the basis of title of the subject-matter. We cannot give such a wide meaning to this clause to cover all suits where by any declaration is sought in respect of any alienation. The clause must be restricted to the categories indicated in the illustrative part. In the view of S. 6(d), it is not necessary for us to go into the question whether S. 6 is restricted to suits and so does not apply to memorandum of appeals.

(8) No other provision was relied upon by Mr.Desai and in view of the specific provision of Article 23(f) in schedule II which provides a fixed court-fee for such a memorandum of appeal, the residuary Article 1 in Schedule I also could not be invoked. We, therefore, hold that the correct court-fee payable on the memorandum of appeal was Rs.30/-. We, therefore, set aside the order of the learned Taxing Officer.

(9) In the result, the petition is allowed. The Rule is made absolute. No order as to costs.

(10) Petition allowed.