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Court : Allahabad

Decided On : Jul-03-2009

Reported in : AIR2009All165; 2009(4)AWC3801

Judge : Amitava Lala and; D.K. Arora, JJ.

Appellant : Shyamal Kumar Ghosh and ors.

Respondent : Malay Ghosh and ors.

Judgement :

Amitava Lala, J.

1. This appeal arises out of the order dated 12th February, 2009 passed by the concerned Civil Judge (Senior Division), Kanpur Nagar directing the plaintiffs/appellants to deposit the ad valorem Court fees in connection with the suit in which the reliefs have been claimed by them in the nature of declaration and injunction.

2. Apart from the incidental reliefs the main reliefs of the suit, as stated in the supplementary affidavit of the appellants, are as follows:

(i) Relief of declaration to declare the will deed dated 15/19-2-2001 is a void document.

(ii) Relief of permanent injunction that the defendant-respondent 1st set and his servants and agents be restrained from interfering in the right and possession of the plaintiffs through force and further the defendant-respondent 1st set be restrained from alienating the said property in any other manner.

3. Firstly, the appellants wanted to take advantage of an interim order passed by a 5 Division Bench of this Court on 17th March, 2009 by saying that at one point of time the appeal was heard by a Division Bench, therefore, the same is required to be heard by the same Bench but when we find from the record that on several occasions plaintiffs/appellants obtained extension of interim order from this Bench without making any comment on it, the appellants switched over the submission on merit by saying that they wanted to clarify the position.

4. Mr. M.D. Singh Shekhar, learned Senior Counsel, has contended at first that the respondents/defendants are only delaying the cause before the court below. In earlier occasion by an order dated 28th April, 2008 this Bench held that the suit will be heard expeditiously. Time was granted to file written statement. Time was also granted to complete the discovery and inspection with regard to relevant documents. A special direction was given for the purpose of day to day hearing without granting unnecessary adjournments. Even from such order the respondents/appellants preferred Special Leave Petition to the Supreme Court but the same was dismissed on 1st August, 2008. Presently the written statement has been filed. Issues are framed. One of the issues is with regard to Court fees and suit valuation. No objection was raised by the plaintiffs/appellants in hearing the preliminary issue independently before hearing other issues.

5. Mr. Shekhar has further contended that all the properties immovable, movable and business are lying with the respondents/defendants. Therefore, unless they get the appropriate valuation of such properties, particularly movables and business, which are absolutely unknown, they are not in a position to make the valuation of the suit for fixing the ad valorem Court fees. He has further contended that as per ratio of the three Judges Bench judgment of the Supreme Court reported in : AIR 1971 SC 87 The State of U.P. v. Ramkrishan Burman and Ors. a decree for declaration of title to money or other property is not 'a decree for money

or other property'. The expression in Section 7(iv-A)(U.P.) means only a decree for recovery of money or other property. It does not include a decree concerning title to money.

6. It is relevant to mention hereunder that during the pendency of the present appeal, another appeal being First Appeal From Order No. 1480 of 2009 Smt. Rajni Swami v. Smt. Shakuntala Sharma this Bench delivered a judgment on 28th May, 2009 (reported in 2009 (5) ALJ 290) in the similar circumstances holding that the ad valorem Court fees is to be given in respect of such type of claim. Sri Shekhar has stated that even in the said judgment of Smt Rajni Swami (supra) was referred. It is true to say that not only that judgment but various other judgments are considered and the Court came to the following conclusion:

We have considered the law. It is our duty to fit the law into the fact to come to a definite finding. There is a big gap between the declaration simpliciter and relief in the garb of declaration. If a person makes a prayer to declare right, title or interest of a property in his favour then it can be construed as declaration simpliciter but when a plaintiff seeks any declaration to disentitle others right into a property, such type of circumvent prayer cannot be treated to be declaration simpliciter. In other words, he is not asking any relief for himself but want to prevent his opponent from enjoying fruit of the property. Therefore, such type of relief is virtually in the nature of injunction at first with the nomenclature of the 'declaration'. Therefore, it is required for the Court to go into the real nature of dispute arising out of the plaint to ascertain the cause and incidental cause which helps it. A Will is execution of document of a testator to give his property to a person of his choice. Such will be enforceable only after the death of the testator. In some of the States of India, grant of probate by the appropriate Court of law on the Will is compulsory and in some of the States it is optional. In the State of U.P., obtain probate on the Will is optional, therefore, as soon as the testator dies and Will comes into light, it operates as a valuable instrument in favour of the person in whose favour property is devolved by such Will. If such person seeks a probate before the Court by filing it, no question of ad valorem Court-fee will be applicable but it will be paid as soon as Court will grant such probate in his favour. In the present case, the defendant/respondent never approached to the Court to obtain a probate but

enjoying the property as successor under the Will. Now, if such Will is declared by the Court as null and void, right of the person in the property or properties under the Will, will be extinguished. Therefore, the principle of securing property under the Will will be attracted. Therefore, under no stretch of imagination we can hold and say that the suit can be entertained on the basis of the fixed Court fees.

Having so, we dismiss the appeal on contest on the legal principle at the stage of admission on the informal papers, as agreed upon, however, without imposing any cost. Consequential effect of the dismissal of the appeal is that the plaintiff is liable to pay ad valorem Court fees.

7. In further Sri Shekhar's contention cannot be appreciated by us since there is a provision of discovery and inspection amongst the parties under Order XI of the Code of Civil Procedure, 1908. Therefore, it is open for the plaintiffs/appellants to take inspection of the properties lying with the respondents and make his own valuation and pay ad valorem Court fees thereon.

8. Sri R.N. Ringh, learned Senior Counsel appearing for the respondents contended that the case is squarely covered by the judgment of this Court in *Smt Rajni Swami* 2009 (5) ALJ 290 (supra). There is scope of further argument on the same issue.

9. We have already held in our earlier judgment that immediately after the death of the propounder of the Will, the property goes in the hands of the beneficiary unless, Of course, grant of probate by the Court is compulsory in nature. Since in the State of Uttar Pradesh grant of probate is optional, one cannot say that the beneficiaries under the Will are not the lawful beneficiaries of the properties. Definitely it can be challenged by way of suit to nullify the same but that can only be done subject to payment of ad valorem Court fees because it goes to the root of enjoyment of the property by the others under the Will.

10. Save what we have observed above the suit herein is not made for mere declaration but clubbed with regard to prayer for injunction. In such circumstances deposit of ad valorem Court fees by the appellants/plaintiffs is also obvious.

11. The point Mr. Shekhar urged before us that the appellants are not aware of the value of the properties or business partially or fully therefore, no ad valorem Court fees can be paid, is not sustainable argument at all. All such submissions lead to the sole requirement of payment of ad valorem Court fees which is the basic point herein. Under no circumstances fixed Court fees can be allowed to be paid. It is plaintiffs' duty to give tentative valuation and deposit the Court fees on the basis of such valuation. Whether the valuation is more or less that will be considered by the Court and if it is less then Court will direct to pay more Court fees, thus suit will not fall but when ad valorem Court fees is prescribed to be paid under the law and not paid even thereafter then the provision of Section 6-A of the Court Fees Act, 1870 will be squarely applicable. Such provision is quoted hereunder:

6-A. Appeal against order to pay court fee.- (1) Any person called upon to make good a deficiency in court-fee may appeal against such order as if it were an order appealable under Section 104 of the Code of Civil Procedure.

The party appealing shall file with the memorandum of appeal, a certified copy of the plaint together with that of the order appealed against.

(2) In case an appeal is filed under sub-section (1), and the plaintiff does not make good the deficiency, all proceedings in the suit shall be stayed and all interim orders made, including an order granting an injunction or appointing a receiver, shall be discharged.

(3) A copy of the memorandum of appeal together with a copy of the plaint and of the order appealed against shall be sent forthwith by the appellate court to the [Commissioner of Stamps].

(4) If such order is varied or reversed in appeal, the appellate court shall if the deficiency has been made good before the appeal is decided, grant to the appellant a certificate, authorising him to receive back from the Collector such amount as is determined by the appellate court to have been paid in excess of the proper court fee.

(5) The court may make such order for the payment of costs of such appeal as it deems fit, and where such costs are payable to the Government, they shall be recoverable as arrears of land revenue.

12. Therefore, in totality we do not find any merit in the appeal. The appeal is dismissed on contest on informal papers, as agreed upon by the parties, however, without imposing any cost. As a result whereof the plaintiffs/appellants are directed to deposit the ad valorem Court fees within a period of one month from this date failing which Section 6-A(2) of the Court Fees Act, 1870 will be squarely applicable in the case of the plaintiffs. However, if such Court fees are paid then all the issues will be taken up together and now disposed of as a time bound manner. Therefore, the appropriate court below having pecuniary jurisdiction is requested to complete the proceedings within a period of three months from the date of such deposit.

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