

Abdul Razack Vs. Anjaneyan

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Court : Kerala

Decided On : May-29-2002

Reported in : AIR2003Ker4

Judge : A. Lekshmikutty, J.

Acts : Kerala Court Fees and Suit Valuation Act, 1959 - Sections 37(2)

Appeal No. : C.R.P. No. 591 of 2000

Appellant : Abdul Razack

Respondent : Anjaneyan

Advocate for Def. : V.T. Madhavanunni and; Suresh Kumar Kodoth, Advs.

Advocate for Pet/Ap. : A.P. Chandrasekharan, Adv.

Disposition : Revision petition allowed

Judgement :

ORDER

A. Lekshmikutty, J.

1. Against the order regarding the additional issue No. 3 in O.S. No, 2 of 1997 on the file of the Sub Court, Kozhikode, this revision is filed by the plaintiff. The plaintiff filed the suit for partition of 1/7th share over the plaint schedule property.

An additional issue was raised regarding court fee. The plaintiff paid court fee under Section 37(2) of the Kerala Court Fees and Suits Valuation Act. The Court below found that the plaintiff has no joint possession over the plaint schedule property and therefore, the court fee paid under Section 37(2) of the Kerala Court Fees and Suits Valuation Act is not correct. Challenging the said order, this revision petition is filed.

2. The only point to be considered is whether the impugned order is liable to be set aside.

3. The petitioner filed the suit for partition and separate possession of 1/7th share over the plaint schedule property with mesne profits and for consequential reliefs. As per the plaintiff, he has purchased 1/7th right over the plaint schedule property from the 8th defendant who got it from the first defendant by auction sale in pursuance of the decree passed in O.S. No. 254 of 1984. The plaintiff along with the 8th defendant filed an application under O.29, R.95 CPC to put him in possession of the first defendant's 1/7th right in the plaint schedule property in E.P. No. 129 of 1993. The said E.P. was closed as barred by limitation. The court below, based on the decision in *Sidheshwar Mukherjee v. Budeshwar Prasad Narain Singh* (AIR 1953 SC 487) found that auction purchaser of undivided share will have no right to joint possession. So, the joint possession pleaded was found against and observed that the court fee paid under Section 37(2) of the Kerala Court Fees and Suits Valuation Act is not correct. It is averred in the plaint that the plaintiff is a co-owner of the property and in joint possession with the defendants. Before passing the order, the court below ought to have considered the averments in the plaint. Exclusion from enjoyment of receipt of income is totally different from exclusion from possession.

4. For the purpose of court fee, the averments in the plaint will have to be prima facie accepted. A denial or other controversy raised in the written statement by the defendants has absolutely no bearing on the question of considering the court fee that is payable on the plaint. For the payment of court fee, the court shall consider the averments made in the plaint. The truth or otherwise of the allegations in the plaint will not arise at the time of deciding the question of payment of court

fee. The respondents have no case that there is no averment in the plaint in respect of the joint ownership and possession. In order to substantiate the contention of the learned counsel for the petitioner, relies on the decisions reported in *Kunjunni v. Jacob* (1992(2) KLT 232, *E.P. Muthu Rowther v. Muhammed Ali Rowther* (1970 KLT 1043) and *Kurivakkat Chacko v. O. Ayissumma*, AIR 1967 SC 176. Based on these decisions, it is to be found that the court below was not justified in finding that the court fee paid by the plaintiff under Section 37(2) of the Court Fees and Suits Valuation Act for partition and separate possession of the plaintiff is not correct. Since there is specific averment in the plaint regarding the joint ownership and possession, the plaintiff need to pay court fee under Section 37(2) of the Act. The decision in AIR 1953 SC 487 (*supra*) relied on by the Court below has no application in this case. The question of payment of court fee was not considered in the said decision. In this circumstances, I am constrained to set aside the impugned order. The plaintiff is liable to pay court fee only under Section 37(2) of the Kerala Court Fees and Suits Valuation Act. The impugned order is set aside and the C.R.P. is allowed. No order as to costs.