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Court : Chennai

Decided On : Oct-20-1910

Reported in : (1911)21MLJ21

Appellant : B. Rangiah Chetty

Respondent : B. Subramania Chetty and ors.

Judgement :

Charles Arnold White, Kt., C.J.

1. The point which has been referred to us is by no means free from difficulty.
2. I think Section 7iv(b) of the Court-Fees Act 1870 applies when the right which is sought to be enforced is a right to share as a separate sharer in joint family property; in other words, it applies to the ordinary suit for partition.
3. It was argued that Section 7(iv)(b) of the Court-Fees Act only applies when the right which is sought to be enforced is a right to share as a joint sharer in joint family property, but it seems to me it is not likely that the legislature would have intended to make specific provision for a comparatively rare form of action and to make 110 specific provision for a very common form of action.
4. If 'to share' in Section 7(iv)(b) means to share as a separate sharer, the court fee, in a suit for partition of joint family property when the plaintiff is in joint possession with the other co-parceners, is otherwise provided for, is governed by

Section 7(iv)(b), and is ad valorem.

5. I have had the advantage of reading the judgments which my learned brethren are about to deliver and I agree with Krishnaswami Aiyar, J. that our answer to the question which has been referred to us should be that Article 1 of the 1st Schedule of the Court-Fees Act applies.

Krishnaswami Aiyar, J.

6. The question stated in the order of reference for our decision is as follows:

Whether, in a suit for partition of joint family property where the plaintiff is in joint possession with the other co-parceners, the fee is to be fixed under Article 1 of Schedule I of the Court Fees Act or under Article 17(vi) of Schedule II of the Act.

7. Whichever of the two provisions applies, we have first of all to determine what is the 'subject matter in dispute.'

8. The plaintiff being in joint possession of the whole, whether that possession is actual or constructive, seeks to convert that into separate possession of his share. It may, therefore, be said that the value of the subject matter in dispute is the difference between the value of the separate possession of the share and the value of the joint possession of the whole; or, as it has been well put in *Ragendro Loll Gossami v. Shama Churn Lahoory* I.L.R. (1879) C. 188, 'it is the value of the convenience of changing the form of the enjoyment of the plaintiff's share.' It seems to me that it may at once be conceded that it is not possible to estimate this difference in value or this convenience in the form of the enjoyment at a money value. But this concession is not enough to settle the application of Article 17(vi) of the 2nd Schedule to the Act. It is further necessary to bring the case within the article, that it is not otherwise provided for by the Act. And herein lies the difficulty.

9. If either Section 7(iv)(b) or Section 7(v) should be applicable there would be a provision under the Act which would exclude the application of Article 17(vi). The referring order does not ask us to decide between Section 7iv(b) and Section 7(v). The learned judges who have made the reference say that as between these two

clauses Section 7(iv)(b) would apply to the present case if Article 17(vi) was out of the case. Section 7(iv)(b) empowers the plaintiff to state the amount of the value of the relief sought. Section 7(v) prescribes special rules for ascertaining the value. But in both the cases the fee payable is ad valorem under Article 1 of Schedule I of the Court Fees Act.

10. Section 7(iv)(b) is in these terms : 'In suits to enforce the right to share in any property on the ground that it is joint family property.' What is the meaning of this clause? Does it cover a suit for partition of joint family property where the plaintiff is in joint possession? It has no application where the property is not the property of a joint family. It must be admitted that a suit by a tenant in common in joint possession for the partition of the common property not belonging to a joint family cannot fall under this clause. As the relief in such a case cannot be estimated at a money value, Article 17(vi) is the only provision applicable. But it does not follow from this, as suggested by Mr. Justice Mookerjee in *Bidatha Roy v. Ram Charitra Roy* (1907) Cri.L.J. 651, that where the property belongs to a joint family the suit to enforce the right to share in it may not fall within the special provision enacted in Section 7(iv)(b). It has been argued that the language of the clause is not 'to enforce the right to a share in the property' but 'to enforce the right to share.' This difference, it is said, indicates that the clause does not deal with the common suit for partition amongst the members of a Hindu family, but with the possible case of a coparcener suing for joint possession where he has been excluded from it or for participation in the profits of the common property, or it may be for a mere declaration of the right to joint possession coupled with a claim to participation in any benefit to which the joint family is entitled. Without in any way repudiating the possibility of such cases being within the scope of the clause in question, as to which, compare *Gundo Anandrav v. Krishnarav Govind* (1867) 4 B.H.C.R.A.C. 55 and *Muttakke v. Thimmappa* I.L.R. (1891) M.186, we may ask the question whether it is at all likely that special provision is made in this clause for such rare cases without dealing with the common case of a suit for partition by a coparcener in possession. It may also be pointed out, adopting the language of Candy J. in *Raoji v. Bala* I.L.R. (1890) B. 135 with reference to similar words in Article 127 of the Limitation Act, that the clause provides for a suit 'to enforce the right' and not 'to establish the right.' It has also to be borne in mind that the clause in question

does not deal with a suit to share in any property which would be more susceptible of the meaning of participation in enjoyment but of a suit to enforce the right to share. Stress has been laid upon the fact that the clause uses the verb 'to share' and not the noun 'share'. And it is argued that if a coparcener's suit for partition was intended to be covered by the clause, the clause would run 'in suits to enforce the right in any property.' But there seems to be no point in this observation, for the language of the clause is more in accordance with the theory of the Hindu Law as regards a coparcener not being entitled to a definite share until actual partition, He is only entitled to share in the joint family property until partition and becomes entitled to a definite share when a decree for partition is made in the suit. As observed by the Privy Council in *Appovier v. Rama Subba Aiyar* (1866) 11 M.I.A. 75, 'according to the true notion of an undivided family in Hindu Law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property that he, that particular member, has a certain definite share.' In *Prithi Pal Singh v. Thakur Jewahir Singh* I.L.R. (1986) C. 493 their Lordships again observed : 'until partition no member of a joint Hindu family is entitled to a definite portion of the family estate.' There appears to be therefore no objection to the legislature having avoided the phrase 'a right to a share' and preferred the expression 'a right to share.' But it has been further argued that the Words 'on the ground that it is joint family property' preclude the construction that a suit for partition is covered by the clause. The result is arrived at by construing the phrase 'on the ground that it is joint family property' to mean 'on the ground that it is property of a continuing joint family.' There appears to be no warrant for so understanding the words of the clause. There is a joint family at the date of the suit. The plaintiff's right to have the property divided is on the ground that the property belongs to the joint family on that date. There is no further cause, of action necessary to entitle the plaintiff to sue. The fact that it is joint family property is sufficient to entitle a coparcener without more to claim his share by partition. I am unable therefore to accept the reasoning of the Bombay High Court in *Dagdu v. Totaram* I.L.R. (1909) B. 658 or of the Calcutta High Court in *Bidhata Roy v. Rpm Charitra Roy* (1907) Cri.L.J. 651. The former of these cases is not in accord with the decision in *Motibhai v. Haridas* I.L.R. (1896) B. 315 and it is not clear whether it was a case where the plaintiff was in joint possession. There is no force

in the remark that, as the other clauses of Section 7(iv) deal with reliefs incapable of valuation, Section 7(iv)(b) should be only understood as referring to an abstract claim or right, for as already pointed out, a suit by a coparcener in possession for division of his share is not capable of estimation at a money value. It may be a good argument against allowing a suit by a coparcener out of possession for division or joint possession to fall within it. The Calcutta case merely refuses to disturb the current of authority in that Court as established by the decisions in *Kirty Churn Mitter v. Aunath Nath Deb* I.L.R. (1882) S.C. 757 and *Mohendro Chandra Ganguli v. Ashutosh Ganguli* I.L.R. (1893) C. 762. It may be that the actual decision in *Walt Ullah v. Durga Prasad Saidan* I.L.R. (1906) A. 340 is open to no exception as the plaintiff there does not appear to have been in joint possession when he asked for partition. This is, however, apart from the question of the correctness of the approval there expressed of the Calcutta cases. But whatever doubts may still exist as regards the cogency of the above reasoning, they seem to me to be completely set at rest by the corresponding language of the various Limitation Acts and the interpretation that has been uniformly placed upon it. When the Court Fees Act was passed, the Limitation Act in force in the country was Act XIV of 1859. Section 1, Clause 13, of that Act ran as follows : 'To suits to enforce the right to share in any property, movable or immovable, on the ground that it is joint family property the period of twelve years' from certain specified dates. Now it will be noticed at a glance that the difference between the first portion of this clause and Section 7(iv), Clause (b), is that 'in' is substituted for the opening word 'to' and the words 'moveable or immovable' are omitted. Being a law of limitation, the rest of the clause proceeds to specify a starting point for the running of the prescribed period. And it may also be that the clause assumes that the plaintiff is out of possession though there are no express words to say so, for otherwise limitation ought not to be allowed to run against him. The fact, therefore, that the clause of the Limitation Act is applied to a plaintiff out of possession while the clause of the Court Fees Act is sought to be applied to a coparcener in possession has no bearing upon the interpretation of the words 'to enforce the right to share in any property on the ground that it is joint family property' which are words common to both the enactments. Act IX of 1871, which introduced into the 1st column of Article 127 the result of judicial decisions as to the plaintiff contemplated being one

out of possession, made no change whatever in the rest of the language of the 1st part of the old clause. The words 'to enforce a right to share' were retained as before. The Article ran thus : 'By a Hindu excluded from joint family property to enforce a right to share therein.' The same language has been retained in the Limitation Acts of 1877 and 1908 with the mere change of the word 'Hindu' into 'person.' Cause 13 of Section 1 of Act XIV of 1859 and Article 127 of the subsequent Limitation Acts have always been constructed by the Privy Council and by the Courts in India as applicable to suits for partition by a coparcener in a Hindu joint family. Section 7, Clause (iv)(b), of the Court Fees Act which followed almost verbatim the language of Clause 13 of Section 1 of the Limitation Act of 1859 is bound to receive the same construction. In *Lakshman Dada Naick v. Ramachandra Dada Naik* I.L.R. (1880) B. 48 and *Appasami Odayar v. Subramanya Odayar* I.L.R. (1887) M. 26 the Privy Council construed the provision of the first Limitation Act. In the latter case they said : 'By Section 1, Clause 13, of Act XIV of 1859, a suit for a share of the family property not brought within 12 years from the date of the last participation in the profits of it would be barred.' The same view was taken by the Indian High Courts. See *Wooma Soonduree Dossee v. Dwarkanath Roy* (1868) 11 W.R. 72, *Gossain Doss Koondoo v. Seroo Koomaree Debia* (1873) 19 W.R. 192, *Govindan Pillai v. Chidambara Pillai* (1866) 3 M.H.C.R. 99 and *Hansji Chhiba v. Valabh Chhiba* I.L.R. (1883) B. 297. Article 127 of the Limitation Act of 1871 received the same construction - *Kali Kishore Roy v. Dhununjoy Roy* I.L.R. (1877) C. 228. The same interpretation was put upon the provision of the Limitation Act of 1877 both by the Privy Council and by the High Courts in India - *Rai Ragunath Bali v. Rai Maharaj Bali* I.L.R. (1885) C. 777, *Pirithi Pal Singh v. Thakur Jewahir Singh* (1886) L.R. 14 C. 493, *Hari v. Maruti* I.L.R. (1882) B. 741 and *Nilo Ramachandra v. Govind Ballal* I.L.R. (1885) B. 24. The remark in *Muttakke v. Thimmappa* I.L.R. (1891) M.186 where, speaking of a suit for a declaration that plaintiff as a member of an Aliyasautana family was joint in estate with the defendants and that he was entitled to the registry in his name of the family property, the Court said that Article 127 did not refer to a suit for a share, must be treated as erroneous in view of the overwhelming consensus of opinion already noticed. In the light therefore of the provisions contained in the various Limitation Acts and especially of the language of Clause 13, Section 1, of

Act XIV of 1859 and the interpretation uniformly placed on them, it is impossible to resist the conclusion that Section 7, Clause (iv)(b), of the Court Fees Act does apply to a suit by a coparcener in possession for partition of joint family property. This view is in accordance with the opinion expressed in *Velu Goundan v. Kumarvelu Goundan* I.L.R. (1896) M. 289. The case (Referred Case No. 5 of 1894) in 4 M.I.J. no was not one of joint family property and could not therefore fall under Section 7, Clause iv (b).

11. During the course of the argument the question was raised whether Section 7, Clause (v), was not the more appropriate provision. Reference was made to *Balvant Ganesh v. Nana Chintamon* I.L.R. (1893) B. 209 and *Degdu v. Totaram* I.L.R. (1909) B. 658 as in support of that view. It is not clear from the facts set out in these cases whether the plaintiff was in joint possession at the date of suit. It is impossible therefore to rely on them as any authority for the view that Section 7, Clause (v), is applicable to a suit where the plaintiff in possession seeks for partition. The learned Judges who made the reference have not stated any question for our consideration as to whether any, and if so, what suits for partition would fall under that clause.

12. Nor is it necessary for us to express any opinion on the question which was referred to, though not fully discussed, in the course of the argument whether a suit for joint possession by a coparcener excluded from possession would fall within Section 7, Clause (iv)(b), or Section 7, Clause (v), of the Court Fees Act. When such a question arises it will be material to consider whether a suit for joint possession is not as much a suit for possession as a suit for exclusive possession and whether, both kinds of suits being suits in ejectment (see WILLIAMS on Ejectment, p. 178, and FREEMAN on Co-tenancy Sections 290 and 293) they should not both be held to fall within Section 7(v.)

13. I would answer the question referred by saying that Article 1, Schedule I, applies.

Ayling, J.

14. I agree in the view expressed by Batchelor and Beaman JJ. in *Dagdu v. Totaram* I.L.R. (1909) B. 658 that a suit to recover by partition a definite and ascertained share of specified property cannot fall under Section 7(iv)(b), of the Court Fees Act. This clause appears to be designed to cover merely the rare, but quite possible, cases where the plaintiff's status as a co-parcener is in dispute, and is sought to be enforced. On this view alone, its inclusion with the other cases of doubtful or difficult valuation contained in the section is intelligible. I do not think it is safe to proceed by analogy of the way Article 127 of the Limitation Act has been interpreted.

15. If Section 7(iv)(b) be ruled out, such a suit must fall under Article 17(vi) of Schedule II or under Section 7(v) of the Court Fees Act. I have no hesitation in concurring in the opinion of Garth C.J. in *Kirty Churn Mitter v. Aunath Nath Deb* (I.L.R. 1882) C. 757 as to the correct method of regarding the relief claimed in suits for partition by a coparcener who is in joint enjoyment at the time of suit; his prayer is merely to change the form of enjoyment and could only be valued by deducting from the the value of his share as ascertained in partition the value of his beneficial enjoyment as coparcener before partition. Apart from personal considerations, which it is impossible to appraise, the two should be equal. It appears to me eminently a case in which it is impossible to estimate in money the value of the suit. To tax such a suit on the value of the partitioned share without deduction under Section 7(v) seems to me inequitable. This point of view does not appear to have been presented to the Court either in *Velu Goundan v. Kumaravelu Goundan* I.L.R. (1896) M. 289 *Motabhai v. Haridas* I.L.R. (1896) B. 315 or *Dagdu v. Totaram* I.L.R. (1909) B. 658.

16. In *Wali Ullah v. Durga Prasad Saidan* I.L.R. (1901) A. 340 the remarks of Garth C.J. are quoted with approval. But the learned Judges decided that an ad valorem fee was leviable under the circumstances of the case under disposal. The plaintiff appears to have been the purchaser of the undivided share of a co-parcener, and the suit was brought 'to establish his title and to recover possession of his share, the claim of partition being added merely to make the relief sought effectual.' Such a case is easily distinguishable from the suit of a co-parcener in joint possession, who merely seeks to convert his joint possession into separate

enjoyment.

17. In *Balwant Genesh v. Nana Chintamon* I.L.R. (1893) B. 209 also, Garth C.J's dictum is quoted with approval, though in the case under disposal a different decision was arrived at - on what grounds, it is not easy to say.

18. For the above reasons, I think the Court fee should be fixed, in cases of the class referred to, under Section 17(vi) of Shedule II.

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