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Court : Kerala

Decided On : Jan-06-2012

Judge : K.T. Sankaran

Appeal No. : WPC.No. 28157 of 2010 (O)

Appellant : Janaki

Respondent : Chandran and Others

Judgement :

1. The petitioner and respondents 1 to 3 are the children of one Pattu. The fourth respondent is the wife of the third defendant. Pattu died in 2002. Claiming a 1/4th share in the property owned and possessed by Pattu, the petitioner filed O.S.No.312 of 2009 on the file of the court of the Munsiff of Chittur.

2. The plaintiff valued the plaint schedule property at Rs.2,80,000/- and her share at Rs.70,000/-. Fixed court fee was paid under Section 37(2) of the Kerala Court Fees and Suits Valuation Act (hereinafter referred to as the Court Fees Act).

3. Defendants 3 and 4 contested the suit. They contended that the valuation and court fee are incorrect. An issue was framed regarding the valuation and court fee. The court below held that the plaintiff is liable to pay court fee under Section 37(1) of the Court Fees Act. The order passed by the court below is under challenge in this Writ Petition filed by the plaintiff.

4. In the plaint, it was alleged that the plaintiff and defendants 1 to 3 are the co-owners and they are in joint possession of the plaint schedule property. It is averred in the plaint that the plaintiff came to know that the third defendant got executed some documents by misrepresentation. It is also averred that the third defendant claims to have executed some documents in favour of the fourth defendant in respect of the property. Even if any document was executed by Pattu, the same is vitiated by fraud and misrepresentation. The further averment in paragraph 9 of the plaint is that property is being possessed by defendants 1 to 3 and they are taking the income.

5. In the written statement filed by dependants 3 and 4, they contended that Pattu executed a will in their favour. After the death of Pattu, the third defendant relinquished his rights in favour of the fourth defendant.

6. The court below held that in the light of the averment in the plaint that the third defendant claims to have got executed some documents in favour of the fourth defendant, who is not co-owner, and the averment that the documents were executed due to misrepresentation, it is to be taken that the plaintiff is not in joint possession of the plaint schedule property, in spite of such an averment of joint possession in the plaint. The court below also held that since the plaintiff claims mesne profits from dependants 1 to 3, it cannot be said that the plaintiff is in joint possession of the plaint schedule property. Accordingly, the court below held that the plaintiff is liable to pay court fee under Section 37(1) of the Court Fees Act.

7. It is well settled that the averments in the plaint would be determinative in the matter of payment of court fee. The averments and contentions in the written statement and the truth or otherwise of the same are not guiding factors to decide the question of court fee.

8. Sub Sections (1) and (2) Section 37 of the Court Fees Act read as follows:

“37. Partition suits:- (1) In a suit for partition and separate possession of a share of joint family property or of property owned, jointly or in common, by a plaintiff who has been excluded from possession of such property, fee shall be computed on the market value of the plaintiff’s share.

(2) In a suit for partition and separate possession of joint family property or property owned, jointly or in common, by a plaintiff who is in joint possession of such property, fee shall be paid at the following rates:-

When the plaint is presented to-

(i) a Munsiff's Court Rupees fifty

(ii) a Sub Court or a District Court Rupees three hundred"

9. In Neelavathi and others vs. N.Natarajan and others (AIR 1980 Supreme Court 691), the Supreme Court considered the scope and ambit of Section 37(1) and 37(2) of the Tamil Nadu Court Fees and Suits Valuation Act, which are similarly worded as Sections 37(1) and (2) of the Kerala Court Fees an Suits Valuation Act. The Supreme Court held thus:

"6. On reading of the plaint as a whole, we are unable to agree with the view taken by the High Court. It is settled law that the question of court fee must be considered in the light of the allegation made in the plaint and its decision cannot be influenced either by the pleas in the written statement or by the final decision of the suit on merits. All the material allegations contained in the plaint should be construed and taken as a whole, vide S. Rm. Ar. Sp. Sathappa Chettiar vs. S. Rm. Ar. Rm. Ramanathan Chettiar 1958 SCR 1021 at pp. 1031-32.

8. ……………. The general principle of law is that in the case of co-owners, the possession of one is in law possession of all, unless ouster or exclusion is proved. To continue to be in joint possession in law, it is not necessary that the plaintiff should be in actual possession of the whole or part of the property. Equally it is not necessary that he should be getting a share or some income from the property. ………….. Before the plaintiffs could be called upon to pay court fee under Section 37(1) of the Act on the ground that they had been excluded from possession, it is necessary that on a reading of the plaint, there should be a clear and specific averment in the plaint that they had been "excluded" from joint possession to which they are entitled to in law. The averments in the plaint that the plaintiff could not remain in joint possession as he was not given any income from the joint

family property would not amount to his exclusion from possession."

10. In Hameed vs. Abdulla Haji (2007(3) KLT 840), it was held thus:

"6. It is trite that for the purpose of determination of the payable court fee, all that is required is to look into the averments in the plaint. The contentions raised by the defendants in the written statement are not to be considered at all. Unless it is possible to say on the allegations in the plaint itself that the plaintiff is out of possession of the plaint schedule properties or any portion thereof, in a suit for partition valuation under Section 37(2) by the plaintiff paying fixed court fee will have to be accepted……………………. Just because it is conceded that the document stands in the name of a stranger, the plaintiff shall not be insisted upon to pay ad valorem court fee under Section 37(1), if the plaintiff avers that the stranger is a name lender without possession and that the document is the result of fraud or collusion between the stranger and somebody who is co-owner along with the plaintiffs."

11. In Thankamma vs. Unniamma Antharjanam (1964 KLT 529), it was held that exclusion from enjoyment of receipt of income is totally different from possession. Mere appropriation of profits of the property or even exclusive use or possession of the property by one co-sharer, does not amount in law to 'exclusion' of the other co-sharers from possession, and such exclusion will have to be established by the averments in the plaint and other evidence in the case.

12. In Abdul Razack vs. Anjaneyan (2002) (2) KLT 670), it was held that 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.

13. The specific averment in the plaint is that the plaintiff is in joint possession of the property. An averment that the income is being taken by some of the co-sharers is not equivalent to an averment that the plaintiff was excluded from possession of the property. In the case of a joint family property or a co-ownership property, there may be several sharers. It is not necessary that all the sharers should actually possess, cultivate and take the income. Some of the sharers may be employed elsewhere in the country or some may be working abroad. That does

not mean that they have been excluded from possession of the property in which they have shares. What is meant by “excluded from possession” under Section 37(1) of the Court Fees Act is something akin to denial of the right of the plaintiff in the property and a consequential exclusion from possession. Possession by some of the co-owners and enjoyment of the property by them alone is not sufficient to constitute exclusion from possession of the remaining co-owners. Joint possession within the meaning of Sub Section (2) of Section 37 does not necessarily mean joint physical possession for all practical purposes. Even if the actual cultivation or taking usufructs is made by one or some of the co-owners, that does not mean that the others are not in joint possession of the property.

14. The court below committed a jurisdictional error in holding that the court fee paid is incorrect and that the plaintiff has to pay ad valorem court fee under Section 37(1) of the Court Fees Act.

Accordingly the order passed by the court below is set aside. The court fee paid by the plaintiff under Section 37(2) of the Court Fees Act is correct.