

CASE NO.:
Appeal (civil) 4739 of 2006

PETITIONER:
Jagannath Amin

RESPONDENT:
Seetharama (dead) by lrs. and Ors.

DATE OF JUDGMENT: 09/11/2006

BENCH:
ARIJIT PASAYAT & LOKESHWAR SINGH PANTA

JUDGMENT:
J U D G M E N T
(Arising Out of S.L.P. (C) No.6221 of 2003)

ARIJIT PASAYAT, J.

Leave granted.

Challenge in this appeal is to the order passed by a learned single judge of the Karnataka High Court dismissing the Civil Revision Petition filed by the appellant.

Challenge before the High Court was to the order passed by learned First Additional Civil Judge, Junior Division, Mangalore, holding that Section 35(1) of the Karnataka Court Fee and Suit Valuation Act, 1958 (in short the 'Act') was applicable and not Section 35(2) of the said Act in a suit for partition relating to agricultural land. Originally the suit was filed by the appellant's mother. She had filed the suit for partition of the scheduled property claiming that the same should be divided into two equal shares by meets and bounds through the process of Court. Plaintiff had filed suit under Section 7(2)(d) of the Act and paid court fee of Rs.200/- under Section 35(2) of the Act. Four defendants filed written statement. Defendant Nos. 2 and 3 also filed written statement separately. After hearing the appellant, learned First Additional Civil Judge framed several issues on 19.12.1998. Appellant contended before the trial court that being a co-owner under the law she is presumed to be in constructive possession of the property and as such court fee is to be paid on the deemed market value and not on actual market value. Plaintiff scheduled property being agricultural property as such court fee is valued under Section 7(2)(d) of the Act and she cannot be compelled to value the said under Section 35(1) of the Act being a co-owner in respect of the plaintiff scheduled property along with the defendants. Defendants took the stand that the property is not agricultural property and is a house site and as such court fee under Section 35(1) of the Act is to be paid on the actual market value and not on deemed market value.

When PW1 was examined during the cross examination of the said witness the defendant No. 4 filed an I.A. under Order XIV, Rule 2(2) of the Code of Civil Procedure, 1908 (in short the 'C.P.C.') for framing additional issues and the same was allowed. Accordingly three additional issues were framed. Thereafter, defendant No.4 again filed an I.A. under Order XIV

Rule 2(2) CPC for taking up additional issue No.3 i.e. regarding payment of court fee as preliminary issue. The trial court was of the view that additional issue No.3 cannot be tried as a preliminary issue and posted the matter for consideration of all issues. Challenging the said order revision was filed before the High Court which disposed of the application stating that the defendant will be at liberty to adduce evidence on the court fee issue as permissible under law. Thereafter the matter proceeded. Again four defendants preferred revision before the High Court questioning direction of the trial court to adduce evidence on all issues. The High Court directed the trial court to treat additional issue no.3 as a preliminary issue and that is how the said issue was framed as preliminary issue. The trial court held that Section 35(1) of the Act was applicable and not Section 35(2) of the Act. The same was challenged by the appellant before the High Court. As noted above, the High Court dismissed the revision petition. The High Court held that though it is true that there is a graded scale under Section 35(2) of the Act which applies to partition suits etc. the trial court had "perhaps" rightly gone into special requirements and has concluded that Section 35(1) would apply to the facts of the present case.

Learned counsel for the appellant submitted that the approach of the High Court is clearly erroneous.

Learned counsel for the respondents on the other hand supported the judgments of the trial court and the High Court.

Identical issues came for consideration before the same High Court in T.K. Srinivasamurthy & Ors. v. T. Seetharamaiah and Ors. (AIR 1990 Karnataka 149). In para 4 of the judgment it was noted as follows:

"That question came up for consideration in CRP 309 of 1987 disposed of on Dec. 2nd, 1988 by one of us. Following the decision of Supreme Court in the case of Neelavathi v. Natarajan (1980) 1 Kant U (SN) Item 126: (AIR 1980 SC 691), concerning S. 37 of the Tamil Nadu Court Fees and Suits Valuation Act, which is in pari materia with S. 35 of the Act, it was held that in a partition suit, plaintiff or plaintiffs was only required to set out the joint family properties in respect of which she or they sought partition and separate possession and pay court fee in accordance with sub-sec. (2) of S. 35 of the Act. The Supreme Court had expressed the following view in Neelavathi's case (AIR 1980 SC 691):

"126. Court feels pay able under S. 37 (1), T.N. Act, if the plaintiff is 'excluded' possession of the joint property. The general principle of law is that in the case of co-owners, possession of one is 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. So long as his right to a share and the nature of the

property is not disputed, the law presumes that he is in joint possession. To apply S. 37(1) there should be a clear and specific averment in the plaint that Plaintiff has been excluded from joint possession. An averment that remain in joint possession would not amount to exclusion from possession."

Similar provisions were examined by this Court in M/s. Commercial Aviation and Travel Company and others v. Mrs. Vimla Pannalal (AIR 1988 SC 1636) it was noted as follows:

"In this connection, we may refer to a five Judge Bench decision of this Court in S. Rm. Ar. S. Sp. Sathappa Chettiar v. S. Rm. Ar. Rm. Ramanathan Chettiar, 1958 SCR 1021(1024) : (AIR 1958 SC 245 at pp. 251-52) Gajendragadkar, J. speaking for the Court observed as follows:

"If the scheme laid down for the computation of fees payable in suits covered by the several sub-sections of S. 7 is considered it would be clear that in respect of suits falling under sub-s. (iv), a departure has been made and liberty has been given to the plaintiff to value his claim for the purposes of court-fees. The theoretical basis of this provision appears to be that in cases in which the plaintiff is given the option to value his claim, it is really difficult to value the claim with any precision or definiteness. Take for instance the claim for partition where the plaintiff seeks to enforce his right to share in any property on the ground that it is joint family property. The basis of the claim is that the property in respect of which a share is claimed is joint family property. In other words, it is property in which the plaintiff has an undivided share. What the plaintiff purports to do by making a claim for partition is to ask the court to give him certain specified properties separately and absolutely on his own account for his share in lieu of his undivided share in the whole property. Now it would be clear that the conversion of the plaintiff's alleged undivided share in the joint family property into his separate share cannot be easily valued in terms of rupees with any precision or definiteness. That is why legislature has left it to the option of the plaintiff to value his claim for the payment of court-fees. It really means that in suits falling under S. 7(iv)(b) the amount stated by the plaintiff as the value of his claim for partition has ordinarily to be accepted by the court in computing the court-fees payable in respect of the said relief. In the circumstances of this

case it is unnecessary to consider whether, under the provisions of this section, the plaintiff has been given an absolute right or option to place any valuation whatever on his relief."

In the above decision, this Court took the view that the conversion of the plaintiff's undivided share in the joint family property into his separate share cannot be easily valued in terms of rupees with any precision or definiteness. It is true that the Court did not consider whether the plaintiff had been given an absolute right or option to place any valuation whatever on his relief under the provision of Section 7(iv) of the Court-fees Act, but the difficulty that would be felt by the Court in exercising its power under Order VII, Rule 11(b) of the Code of Civil Procedure is that if it is unable to determine the correct value of the relief, it cannot direct the plaintiff to correct the valuation. Order VII, Rule 11(b) contemplates correct valuation and not approximate correct valuation and such correct valuation of the relief has to be determined by the Court. If the Court cannot determine the correct valuation of the relief claimed, it cannot require the plaintiff to correct the valuation and, consequently, Order VII, Rule 11(b) will not be applicable."

Reference was also made to the decision in Neelavathi and Ors. v. N. Natarajan and Others (AIR 1980 SC 691). In para 8 this court while considering the identical provision of the Tamil Nadu Court Fee and Suits Valuation Act, 1955 stated as follows:

"8. Section 37 of the Tamil Nadu Court Fees and Suits Valuation Act relates to Partition Suits. Sec. 37 provides as follows:

"37 (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.

"37 (1) 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 rates prescribed."

It will be seen that the Court Fee is payable under Section 37 (1) if the plaintiff is "excluded" from possession of the property. The plaintiffs who are sisters of the defendants, claimed to be members of the joint family, and prayed for partition alleging that they are in joint possession. Under the proviso to Section 6 of the Hindu Succession Act, 1956 (Act 30 of 1956) the plaintiffs being the

daughters of the male Hindu who died after the commencement of the Act, having at the time of the death an interest in the mitakshara coparcenary property, acquired an interest by devolution under the Act. It is not in dispute that the plaintiffs are entitled to a share. The property to which the plaintiffs are entitled is undivided 'joint family property' though not in the strict sense of the term. 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. So long as his right to a share and the nature of the property as joint is not disputed the law presumes that he is in joint possession unless he is excluded from such possession. Before the plaintiffs could be called upon to pay court fee under Sec. 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. We are unable to read into the plaint a clear and specific admission that the plaintiff had been excluded from possession."

In view of what has been stated in M/s Commercial Aviation's case (supra) and Neelavathi's case (supra) the view of the trial judge as affirmed by the High Court cannot be sustained.

The order of the High Court is set aside. The appeal is allowed but without any order as to costs.