

REFERENCE UNDER THE COURT-FEES ACT.

Before Rankin C. J.

NANDALAL MUKHERJI

v.

KALIPADA MUKHERJI.*

1931

May 15.

Court-fees—Appeal—Partition—Court-fees Act (VII of 1870), Sch. II, Art. 17, cl. vi.

In a suit for partition of two properties, of which the plaintiff was in joint possession, the plaintiff claimed various other reliefs, as declaration of title, permanent injunction, etc. The suit was decreed as regards one property and dismissed as regards the other. Against that, the plaintiff appealed and, on the memorandum, paid court-fees as prescribed under Schedule II, Article 17, clause vi of the Court-fees Act. On that, the Registrar made a reference as to whether the memorandum of appeal was properly stamped.

Held that the plaintiff could appeal against a part of the decree and the appeal was only for partition of the second property. The memorandum of appeal was allowed to be amended accordingly and the court-fees paid were held to be sufficient.

Kirty Churn Mitter v. Aunath Nath Deb (1) and *Rajani Kanta Bag v. Rajabala Dasi* (2) followed.

REFERENCE under section 5 of the Court-fees Act.

This was a suit for partition of two properties, *ka* and *kha*, by the plaintiff, who was in joint possession of them with the defendant No. 1, his brother. *Ka* was an ancestral property and *kha*, the plaintiff alleged, was purchased by the defendant No. 1 out of joint family funds. *Kha* was mortgaged by the defendant No. 1 and the mortgagee got a decree for sale of the property. In the plaint, various forms of relief were asked, particularly, declaration of title and permanent injunction restraining the mortgagee defendants from taking possession of the plaintiff's share. The suit was decreed as regards *ka*, but was dismissed as regards *kha*.

*Reference made by the Registrar, Appellate Side, High Court, dated April 27, 1931, in Appeal from Original Decree, No. 150 of 1931.

(1) (1882) I. L. R. 8 Calc. 757.

(2) (1924) I. L. R. 52 Calc. 128.

1931
 Nandalal
 Mukherji
 v.
 Kalipada
 Mukherji.

On that, the plaintiff appealed. The Stamp Reporter was of opinion that *ad valorem* stamp had to be paid on the memorandum of appeal and placed it before the Registrar, who made this Reference to the Chief Justice as to what would be the proper court-fee.

Panchanan Ghosh and *Hiralal Ganguli* for the appellant.

Senior Government Pleader, Saratchandra Basak, and *Assistant Government Pleader, Nasim Ali*, for the Government.

RANKIN C. J. In this case, the plaintiff brought his suit, alleging that he and the defendant No. 1 were brothers. As regards the property of the first schedule, it was alleged that that was their ancestral property and that the two brothers were in possession thereof in equal shares. That property was said to be of the market value of some Rs. 16,000. As regards the second schedule property, the plaintiff's case was that it was acquired by the joint family fund when the defendant No. 1 was the *kartā*. This appears to be a residential house in the suburbs of Calcutta and its value is put down as Rs. 84,000. The plaintiff's case is that he had been actually living in that house, when the events which I am about to mention happened. He says that the defendant No. 1 mortgaged the whole of the second schedule property—I omit all reference to the property of the first schedule—to the defendants Nos. 2 to 4 on the footing that the defendant No. 1 was the sole owner of the house and he also executed a subsequent encumbrance in favour of the defendant No. 5. The first mortgagees brought a suit to which the defendant No. 5 was made a party and got a mortgage decree for sale and, in the mortgage sale, the property was purchased by the defendant No. 6, brother of the defendant No. 5. Now, when the plaintiff brought his suit, he alleged that these mortgages by the defendant No. 1 were all

fraudulent, apparently fraudulent on the part of both the mortgagor and the mortgagees and he said that the suit and the execution sale and everything else he could think of were fraudulent. He further alleged that the sale in execution had thrown a cloud upon his title and that he was threatened with being evicted from possession of the house by process under the mortgage sale; and, as is usually the case in the *mofussil*, he asked for various forms of relief, particularly, declaration of title and permanent injunction restraining the mortgagee defendants from taking possession of the plaintiff's share. That suit has been dealt with by the trial court. As regards the first schedule property, the trial court has declared the plaintiff's title to an eight anna share and has decreed that the plaintiff is to get possession of it after partition. So far as that part of the decree is concerned, the plaintiff makes no complaint at all. As regards the second schedule property, the plaintiff's claim has been simply dismissed and the plaintiff brings this appeal. The appeal is clearly concerned only with the second schedule property. The grounds mentioned in the body of the memorandum of appeal are all grounds concerning the question whether this second schedule property was really joint property, in which the plaintiff had an interest, or was the sole property of the defendant No. 1. But, under the cause title, the plaintiff put the following "Appeal valued at Rs. 1,00,000 for declaration of title and partition and at Rs. 100 for injunction." Accordingly, the Stamp Reporter and the learned Registrar have been occasioned a great deal of difficulty in finding out the proper court-fee payable on this appeal.

1931

*Nandalal
Mukherji*

v.

*Kalipada
Mukherji.**Rankin C. J.*

Before me, the learned advocate for the appellant very clearly says that it would be quite sufficient for his purpose to get a decree for partition in respect of the second schedule property. It matters nothing to him, he says, whether the defendant No. 1 has or has not validly parted with his own half share. The defendant No. 1 and also

1931

Nandalal
Mukherji

v.

Kalipada
Mukherji.

Rankin C. J.

the defendant No. 6 are parties to this suit. Declaration of title is a pure empty thing in the circumstances and a claim for injunction is a pure empty claim and the learned advocate comes in with the suggestion that, if this appeal is limited to a complaint against the decree of the court below only in so far as it refuses to the plaintiff partition of the second schedule property, it seems perfectly clear that the court-fee already paid is sufficient. I have, therefore, to see whether there is any objection to the appellant having leave to amend his memorandum of appeal and taking the course which he proposes.

Now, if this were a case in which the plaintiff was, according to his own showing, out of possession, I do not suppose that it would be right to allow him to appeal merely upon the question of partition. A person is not entitled to partition unless and until he is in possession of his share. But, if he is out of possession of his share, the court does not require him to bring two suits. He can bring a suit in which he may claim to recover possession of his share and he may also claim to have that share partitioned by the same decree. If it appears that he is out of possession according to his own showing, then he has to bring a suit to get possession of his share; and it is perfectly true that, in that case, he would have to pay court-fee on the market value of that share. It is not a question of declaration or declaration with consequential relief. He would have to pay court-fee as in a suit for possession. That I take to be the meaning of what was said by Garth C. J. in the case of *Kirty Churn Mitter v. Aunath Nath Deb* (1), and also by Mr. Justice Chakravarti in *Rajani Kanta Bag v. Rajabala Dasi* (2). In the latter case, the principle applicable seems to be laid down with great clearness. The present case, in my judgment, is a case where the plaintiff is now claiming partition of a residential house on the footing that he is actually sitting there and living there and has been doing so for some time. That being so, it is entirely

(1) (1882) I. L. R. 8 Calc. 757.

(2) (1924) I. L. R. 52 Calc. 128.

unnecessary to make him pay court-fee upon a claim to recover possession. In my judgment, it is a clean case of partition and is not converted into a case of claim to possession, because the defendant brother or the defendant mortgagees want to set up that the house is not joint property and that the plaintiff has no title to it. It is quite true that these considerations would not be applicable to a plaint drawn as this plaint was drawn, because (whatever reliefs the plaintiff required to ask for) he did ask for various reliefs—declaration, injunction and so forth. But when the case is disposed of and he comes before the court again as an appellant, he is not obliged to appeal against any part of the decree that he does not want to appeal against and, in my judgment, he is quite entitled to say in this appeal “I made all “sorts of unnecessary claims (they may be wrong “claims) in the court below; but one claim of mine “was right, namely, that I was entitled to partition “and I shall confine my appeal to that.” The learned advocate for the appellant taking that view and being willing to confine his appeal purely to the question whether or not he is entitled to partition, I am of opinion that he ought to be allowed to do so; and, on the memorandum of appeal being amended in the sense which I have referred to, it is quite clear that the court-fee already paid is sufficient. That is the order which I propose to make upon this matter.

1931

*Nandalal
Mukherji*
v.
*Kalipada
Mukherji.*

Rankin C. J.