1906

GARURDHUJ PRASAD SINGH v. BAIJU MAL.

section 244 against whom restitution can be sought by way of execution. We accordingly allow the appeal, set aside the order of the Court below, and remand the case to that Court under section 562 of the Code of Civil Procedure for determination of the other questions which arise in the case and for the disposal of it according to law. The appellants will have their costs of this appeal. Other costs will follow the event.

Appeal decreed and cause remanded.

1906
January 11.

Before Mr. Justice Banerji and Mr. Justice Richards.

WALI-ULLAH AND ANOTHER (DEFENDANTS) *v.* DURGA PRASAD (PLAINTIFF) AND SAIDAN (DEFENDANTS).*

Act No. VII of 1870 *(Court Fees Act), schedule II, article* 17, *clause (vi) —Court fee—Suit to recover possession of a share in immovable property after partition.*

Where on the face of the plaint it appeared that the suit was in fact a suit to establish the plaintiff's title to a one-third share in certain property and to recover possession of the same, a claim for partition being added to make the relief sought effectual, it was *held* that an *ad valorem* fee was payable on the plaint and not a fee of Rs. 10 as provided by article 17, clause (vi) of the second schedule to the Court Fees Act. *Balwant Ganesh* v. *Nana Chintaman* (1) followed. *Kirty Churn Mitter* v. *Annath Nath Deh* (2) referred to.

IN this case the plaintiff prayed, that "the one-third share of Juala Pershad, the former owner, may, by right of ownership, purchase and delivery of possession to the plaintiff, be put in separate possession of the plaintiff by means of partition."

On this a Court fee of ten rupees was paid under schedule II, article 17(vi) of the Court Fees Act (Act VII of 1870). The Court of first instance (Subordinate Judge of Agra) found that inasmuch as the plaintiff was not on the evidence in actual physical possession of any portion of the house, &c., an *ad valorem* fee was payable. The lower appellate Court (District Judge of Agra) reversed the order of the Court of first instance and remanded the case for disposal on the merits, holding that

* First Appeal No. 97 of 1905, from an order of A. B Bruce, Esq., District Judge of Agra, dated the 25th of April, 1905.

(1) (1893) I. L. R., 18 Bom., 209. (2) (1882) I. L. R., 8 Calc., 757.

regard must be had to the allegations of the plaintiff in his plaint and to the relief sought apart altogether from evidence.

Dr. *Satish Chandra Banerji*, for the appellants.

Babu *Jogindro Nath Chaudhri*, for the respondents.

BANERJI and RICHARDS, JJ.—This appeal arises in a suit which was brought by the plaintiff to recover possession of a one-third share in certain house property. The Court of first instance was of opinion that the court fee paid was insufficient, and after allowing the plaintiff time to make good the deficiency rejected the plaint on the plaintiff's refusal to make good the fee. The lower appellate Court reversed the order of the Court of first instance, and remanded the case for disposal on the merits. From this order the present appeal is taken. The lower appellate Court was of opinion that the suit was really a suit for partition and nothing more, and that in that case the court fee was the fee of Rs. 10, which was duly paid. We also think that if the suit were merely a suit for partition this decision would be quite right. We also agree with the lower appellate Court that in determining what the court fee should be, regard must be had to the allegations of the plaintiff in his plaint and to the relief sought, apart altogether from evidence. We accordingly have considered the plaint in the present case, and after a perusal of it we are clearly of opinion that the suit was in fact a suit to establish the plaintiff's title to a one-third share in the property, and to recover possession of the same, a claim for partition being added to make the relief sought effectual. This being so, the court fee was not the fee of Rs. 10 payable under article 17, clause (vi), of schedule II of the Court Fees Act, but it should have been an *ad valorem* fee on the value of the share. In the case of *Kirty Churn Mitter* v. *Aunath Nath Deb* (1) Sir Richard Garth, Chief Justice, says:—"If the plaintiff's suit had been to recover possession of or establish his title to the share which he claims in the property, he must have paid an *ad valorem* stamp fee on the value of that share." He then goes on to say that in the case before him the plaintiff merely claimed partition, or, in other words, to "change the form of his enjoyment" of the property, and article

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

1906

WALI-ULLAH v. DURGA PRASAD AND SAIDAN.

17, clause (vi), of schedule II applied. The same view was taken in the case of *Balwant Ganesh* v. *Nana Chintamon* (1). We accordingly consider that the decision of the Court of first instance was right, and that the order of that Court must be restored. We allow the appeal, set aside the order of the lower appellate Court and restore that of the Court of first instance with costs in all Courts.

Appeal decreed.

1906
January 12.

CIVIL REFERENCE.

Before Mr. Justice Banerji and Mr. Justice Richards.

ABDUL KARIM KHAN (PLAINTIFF) *v.* ABDUL QAYUM KHAN (DEFENDANT).*

Muhammadan law—Will—Construction of document.

One Muhammad Azim made a will, whereby, after making provision for his widow and daughters, he divided his property between his three sons giving to each certain villages. The gift was *prima facie* absolute, but the will further provided that none of the sons should have a right to alienate the property devised to him, and that on the death of one of the devisees without issue his share should go to the surviving brother or brothers or his or their heirs. The testator died, leaving surviving him three sons, Abdul Qayum and Abdul Kadir by one wife, and Abdul Karim by another. The will was assented to by the heirs of the testator, and the three sons entered into possession of their shares. Then Abdul Kadir died, and his full brother, Abdul Qayum, took possession of his share. *Held*, on suit by the half-brother for possession of half the share, that according to the Muhammadan law the three devisees took absolutely, and the plaintiff's claim could not be maintained.

THIS was a reference made by the Local Government under the provisions of the Kumaun Rules, 1894, and arose out of the following circumstances:—One Muhammad Azim made a will on the 4th of March, 1878, whereby, after making provision for his widow and daughters, he divided his property between his three sons, giving to each of them certain villages. *Prima facie* the gift of the villages to each son was an absolute gift; but the will further provided that no son should have the right to alienate the property given to him, and that on his death without issue the widow of the son so dying should take no

* Miscellaneous No. 243 of 1905.

(1) (1893) I. L. R., 18 Bom., 209.