REFERENCE UNDER THE COURT-FEES ACT, 1870.

Before Das and Ross, J.J.

1924.

March, 12.

SITBARAN JHA PANDEY

v.

LOKENATH MISSIR.*

Court-Fees Act, 1870 (*VII of* 1870), *section* 17—*joint possession and partition, suit for—whether embraces two "subjects"*.

Where the plaintiff brought a suit for joint possession and for partition and prayed for "possession by means of partition," *held*, that, the plaintiff was bound to pay the fixed fee for partition in addition to the *ad valorem* fee as in a suit for possession, inasmuch as the suit embraced two distinct causes of action, and, therefore, two "subjects" within the meaning of section 17 of the Court-Fees Act, 1870.

Held, also, that a person can not be allowed to bring an action for ejectment under the guise of a partition suit unless he asks the court to determine his title and to give him the appropriate relief as in an action for ejectment.

The facts of the case material to this report are stated in the following order of the Taxing Officer :—

18th January, 1924. " This is a court-fee matter. The defendants first and second party jointly held 211 *bighas* of *istamrari mukarrari* lands under a *patta*. Defendants first party mortgaged a 5-annas 4-pies share in the *mukarrari* to the plaintiffs who brought a mortgage suit and got a decree. Two-thirds of the above 5-annas 4-pies share was excepted from the sale on the mortgage as certain of the defendants second party paid up the dues in respect of that two-thirds share. The remaining one-third share of 5-annas 4-pies, that is, 1-anna 9-*gandas* odd share of the defendants first party was sold in execution and was

* In the matter of Court-fees in Appeal, from Appellate Decree No. 147 of 1924.

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purchased by the plaintiffs. They obtained delivery of possession through the Court and they have now brought this case for partition with *khas* possession, alleging that the defendants have refused to partition and give them separate possession; they also claim mesne profits; they have valued the suit at Rs. 500 made up of Rs. 400 the value of the land, and Rs. 100 mesne profits. The trial Court decreed the suit. The contesting defendants first party appealed to the lower appellate Court and valued their appeal similarly. The appeal was dismissed except in respect of mesne profits decreed, and now the plaintiffs have filed this appeal claiming mesne profits, valued it at Rs. 100 and have paid court-fees on that amount. So the appeal is properly stamped.

The learned Stamp Reporter, however, takes objection to the stamping of the plaint and the defendants appeal to the lower appellate Court contending that in addition to the *ad valorem* fee already paid, a separate fee is also leviable for partition throughout, and he relies on certain unreported cases of this Court [*Lachmi Sahu* v. *Radha Krishna Sahu* (1), M. J. C. 45 of 1920, S. A. 1023 of 1921, M. J. C. 44 of 1922 and F. A. 64 of 1923; and also on *Dip Chand Rai* v. *Chhetru Lal* (2) and on *Rachhya Raut* v. *Mussammat Chando* (3)].

The learned Vakil on behalf of the appellants on the other hand contends in the first place that he is in possession of the land and there being no complete ouster he is not bound to pay *ad valorem* fees but only a fee for partition, that as a matter of fact he has overstamped the plaint and that the memorandum of appeal by the defendant to the lower appellate Court is also overstamped. I do not see much force in that part of his argument. The judgments of both Courts show that in spite of delivery of possession through the Court the plaintiffs were not in possession. Mesne

(1) (1919) 51 Ind. Cas. 77. (2) (1920) 56 Ind. Cas.
(3) (1921) 6 Pat. L. J. 662.

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profits are also claimed and after all the best answer to the learned Vakil's contention is the fact that in the lower Courts the legal advisers for both sides took the view that the case was one in which an *ad valorem* court-fee was payable.

But the next portion of his argument that he cannot be called on to pay the fixed fee for partition in addition to an *ad valorem* fee seems to have force. The question is whether a suit for declaration of title which involves a consequential relief for possession, and for partition, requires in addition to the *ad valorem* fee the fixed fee for partition. The learned Vakil relies on *Wali-ul-lah* v. *Durga Prasad*(1). Their Lordships in that ruling said: "We are clearly of opinion that the suit was in fact a suit to establish the plaintiff's title to one-third share of the property and to recover possession, a claim for partition being added to make the relief sought effectual. That being so the court-fee was not the fee of ten rupees payable under Article 17, clause (7), of Schedule II of the Court-fees Act, but it should have been an *ad valorem* fee on the value of the share." See also *Kirty Churn Mitter* v. *Annath Nath Deb* (2), where Garth, C.J., says: "If the plaintiff's suit had been to recover possession of or to establish his title to the share which he claims in the property he must pay *ad valorem* stamp on the value of that share." Reliance is also placed on *Tara Chand Mukerji* v. *Afzal Beg* (3). In that case their Lordships ruled: "But where the plaintiff is out of possession, and claims possession and partition, then he must pay court-fee calculated on the value of the share claimed by him." There is nothing in either of these two rulings to show that in these two cases an additional fee for partition was insisted on, and these two cases are practically on all fours with the present case except that in the present case the plaintiffs had not been able to make the delivery of

(1) (1906) I. L. R. 28 All. 340. (2) (1882) I. L. R. 8 Cal. 757.
(3) (1912) I. L. R. 34 All. 184.

possession by the Court effectual, and so they had to bring this suit which in reality is one for being put in possession by means of partition. No other form of possession will be any use to them.

The Stamp Reporter relies on the cases cited above. It is true that in *Lachmi Sahu* v. *Radha Krishna Sahu* (1), Das, J. said: "I think it was necessary for the plaintiff to sue for possession as well as for partition because it was well established that there must be unity of title as well as possession to entitle the plaintiff to claim title as well as recovery of possession. Therefore strictly speaking the plaintiff's suit should have been a suit first of all for joint possession and then for partition. This only, in my opinion, affects the question of court-fee payable by the plaintiffs on the plaint." But this ruling does not lay down that a separate fee for partition should be exacted. Similarly as to F. A. 64 of 1923 on which the learned Stamp Reporter constantly relies in these cases, that suit though it would seem to support his contention, does not definitely lay down that an additional fee for partition should be levied, and with two exceptions all the other rulings relied upon seem to me only authoritative on the question of *ad valorem* fee *versus* fixed fee, not on the question raised now of *ad valorem* fee *plus* fixed fee. The exceptions I refer to are, first, the learned Chief Justice's decision in Miscellaneous Judicial Case No. 44 of 1922. His Lordship says: "There can be no doubt that in a case where the plaintiff brings a partition suit and in addition claims a declaration of his title to the property, he must in addition to the ordinary fee payable in a partition suit pay also an *ad valorem* fee upon that portion of the property on which he seeks declaration of his title." The other case is *Rachhya Raut* v. *Mussammat Chando* (2). These two rulings are at first sight undoubtedly in favour of the view taken by the learned Stamp Reporter, but it appears

(1) (1919) 51 Ind. Cas. 77. (2) (1921) 6 Pat. L. J. 662.

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to me that they are distinguishable from the present case, as in both of them the party desiring partition was actually in possession of a portion of the suit land of which he was seeking partition and was out of possession of a portion. That is the reason, I think, why separate court-fees were insisted on. On the other hand, there are the Allahabad rulings to which I have referred. What one must look at in cases like these is the real nature of the suit, and in the present case my own view is that the suit is one for recovery of possession by means of partition and, in my opinion, only one fee is necessary, namely, an *ad valorem* fee. If the additional court-fee on the relief for partition is to be levied, it must be done in my opinion, under section 17 of the Court-Fees Act. But it can hardly be said that a suit like the present embraces two subjects within the meaning of section 17 as defined in *Nauratan Lal* v. *Stephenson* (1). Now that parties have been schooled into paying *ad valorem* fees in partition suits which in reality involve the question of title and recovery of possession, this further question as to whether in addition to the *ad valorem* fee the fixed fee for partition is also to be levied comes up practically every day before me. I have, therefore, to ask for an authoritative decision which may be followed in future. With these remarks I submit the case to the Bench for orders as to the deficit on the plaint. The Government should be represented before the Bench."

Sailenath Palit, for the appellants.

Sultan Ahmed, Government Advocate, for the respondents.

DAS, J.—I am unable to agree with the view expressed by the learned Taxing Officer in his order dated the 18th January, 1924. The suit was clearly one for possession and for partition. It was contended before the Taxing Officer that the plaintiffs were in

(1) (1919) 4 Pat. L. J. 195.

possession of the disputed lands, and that, there being no complete ouster, they were not bound to pay *ad valorem* fees, but only a fee for partition. I quite agree that if it were the case of the plaintiffs in the plaint that they were in possession of some of the properties sought to be partitioned, they could not be called upon to pay the *ad valorem* fee. But that is not the case of the plaintiffs in the plaint. On their own allegations, the plaintiffs were not in possession of any portion of the properties sought to be partitioned, and it is sufficient to refer to the reliefs claimed to show that the suit of the plaintiffs was one for joint possession and for partition. I need not pursue this subject any further, for I am in entire agreement with the view expressed by the Taxing Officer on this point.

But then the Taxing Officer took the view that the plaintiffs ought not to be called upon to pay the fixed fee leviable in a suit for partition in addition to the *ad valorem* fee in a suit for possession. He held that the suit in reality is one "for being put in possession by means of partition", and that only one fee is necessary, namely, an *ad valorem* fee. He conceded that if it could be shown that the suit embraced two "subjects" within the meaning of that term as employed in the Court-Fees Act, something might be said in favour of the view taken by the Stamp Reporter; but he thought that the suit did not embrace two "subjects", the only subject of the suit being "recovery of possession by means of partition". In this view, he came to the conclusion that the plaintiffs ought not to be called upon to pay the fixed fee leviable in a suit for partition.

With all respect, I am unable to take the same view. I agree that the test is to see whether the suit embraces two "subjects" within the meaning of section 17 of the Court-Fees Act. Now, although the difference in the jurisdictions of Courts of Common Law and Courts of Equity in England does not obtain in this country, it is still useful to refer to that in

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dealing with the point whether the plaintiffs' suit should be regarded as one for possession and partition or as one for possession by means of partition. Before the Judicatnre Act, the Court of Chancery had jurisdiction to pass a decree for partition, provided there was no question of title or of possession to be tried between the parties. This was commonly expressed by saying that " the suit for partition is based on the assumption that there is no litigation " [see *Slade* v. *Barlow* (1)]. But if a question of title or of possession was raised by the defendant, or if the plaintiffs' suit disclosed that there was a question of title or of possession to be tried, the Court of Chancery declined to go on with the partition suit, until those questions—the litigation between the parties—had been determined by the Court of Law. The ordinary procedure was to direct the suit in Chancery to be retained for a year, and to give liberty to the plaintiffs, " to bring such actions at law as they may be advised ". Now, if a suit for joint possession and partition could be regarded as a suit for possession by means of partition, it would be sufficient for a plaintiff, before the Judicature Act, to go to the Court of Law and to ask that Court to give him all the reliefs claimed by him. It would be unnecessary for him to go first to the Court of Law and then to the Court of Chancery in order to obtain an adjudication of his title and a decree for partition. The Judicature Act has no doubt simplified the procedure in that it has given power to the Chancery Division to adjudicate on disputed questions of title; but the law remains what it was, namely, that a party seeking partition must ask for joint possession, if he is out of possession, as a condition precedent to a decree for partition. The causes of action are entirely different, and the one is not included in the other. The change introduced by the Judicature Act is a change in procedure, not a change in substantive law.

(1) (1868-69) L. R. 7 Eq. 296 (301).

In this country we are governed by the Code which allows a plaintiff to unite in the same suit several causes of action against the defendant. But for this provision, the Court would have to tell the plaintiff who, being out of possession, is asking the Court to pass a decree for partition, that he must proceed by ejectment and establish his title, and then come for partition. The provision in the Code has no doubt simplified the procedure; but the substance remains the same, namely, that a person cannot be allowed, under a guise of a partition action, to bring an action of ejectment, unless he asks the Court to determine his title and to give him the appropriate relief as in an action of ejectment. In England, before the Judicature Act, a plaintiff had to bring two actions, one at law and the other in equity. Under the Judicature Act in England and under the Civil Procedure Code in India, he may bring one suit and unite several causes of action in that suit. The difference, as I have said, is in procedure, and not in the substantive rights of the parties. In my judgment, the present suit embraces two distinct causes of action, and, therefore, two subjects within the meaning of section 17 of the Court-Fees Act. That being so, the plaintiffs must pay the fixed fee for partition in addition to the *ad valorem* fee as in a suit for possession.

Ross, J.—I agree.

PRIVY COUNCIL.

HUKUM CHAND

v.

RAN BAHADUR SINGH.*

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March, 18.

Chota Nagpur Encumbered Estates Act (VI of 1876) sections 17, 18—Manager alone empowered to grant lease—alleged agreement by officials of Lieutenant-Governor.

* *Present*: Lord Shaw, Lord Blanesburgh, Mr. Ameer Ali, Sir Lawrence Jenkins and Lord Salvesen.