

accurate verification of vakalatnamas, we see no reason to disagree with the report of the tribunal or to make any further order in this matter.

J. K.

Report accepted.

**REFERENCE UNDER THE COURT FEE ACT,
1870.**

Before James, J.

NAND KISHOR KUMAR.

v.

ACHAMBIT KUMAR.*

Court Fee—suit for partition—averment in plaint, whether the sole guide for ascertainment of court-fee leviable—Ad valorem court-fee, whether can be demanded if the defendant pleads adverse possession—practice.

It has not ordinarily been the practice of the Patna High Court to depend exclusively on the averment in the plaint for the ascertainment of what should be the proper court-fee payable which should be determined on an appreciation of what the plaintiff really sought.

Jai Pratap Narain v. Rabi Pratap Narain(1) not followed.

The plaintiff cannot be required to pay ad valorem court-fee in a partition suit merely because the defendant pleaded adverse possession.

Sukha Nand v. Musammam Shiva Devi (2) and *Peshauri Lal v. Jai Kishan Das*(3), distinguished.

But the court should be astute to see that plaintiffs should not avoid liability to pay court-fee under section 7(i)(c) or section 7(v) of the Act merely by omitting to assert a prayer for possession in what was essentially a title suit in the guise of a partition suit.

Reference under the Court Fees Act, section 5.

*In the matter of First Appeal no. of 1936.

(1) (1930) I. L. R. 52 All. 756.

(2) (1935) A. I. R. (Lah.) 14.

(3) (1931) 142 Ind. Cas. 829.

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AN ADVOCATE
IN THE
MATTER OF.

COURTNEY
TERRELL,
C. J.
AND
MOHAMAD
NOOR
AND
VARMA, JJ.

1937.

April, 26.

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The facts of the case material to this report are set out in the judgment of James, J.

Janak Kishore and *P. Jha*, for the appellant.

Government Pleader, for the Crown.

JAMES, J.—The plaintiff-appellant instituted a suit for partition of a fairly large area of immovable property, consisting of several estates and certain subordinate tenures, claiming that he was in joint possession with the defendants. Three of these estates, Akbarpur Rani tauzi no. 1213, Srikishunpur tauzi no. 9190 and Mathura Sri Ram tauzi no. 8909 were entered in the Collector's registers in the name of Musammat Sanjho Kuer defendant no. 20 in the suit. The plaintiff asserted in his plaint that Musammat Sanjho Kuer had been permitted to obtain entry of her name in respect of these estates on the understanding that she was enjoying possession merely for her maintenance, but that she was putting forward a claim to proprietorship in the tauzis. The Subordinate Judge found that the plaintiff had no joint possession with Musammat Sanjho Kuer in these tauzis, and that she was entitled to occupy in her own right, the plaintiff having no title. The plaintiff had appealed, inter alia, from that part of the Subordinate Judge's decision. The Stamp Reporter objected that ad valorem court-fee should be payable on the value of the share claimed by the plaintiff in these estates. The Taxing Officer has made a reference under section 5 of the Court-Fees Act on this matter on grounds different from those of the Stamp Reporter. The Taxing Officer thinks that ad valorem court-fee should be payable on the memorandum of appeal on the additions which the plaintiff seeks to obtain for his share by his appeal in this Court.

Mr. Janak Kishore on behalf of the appellant suggests that since the plaintiff had not in his plaint

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averred that he had title to the tauzis which were in the possession of Musammat Sanjho Kuer and since he did not specifically pray for possession of those shares, he should not be held liable to pay ad valorem court-fee on the value of that property. The plaintiff was careful to avoid stating in his plaint that Musammat Sanjho Kuer was adversely in possession of these tauzis; and he cast his claims for relief in such a form that the matter might well have escaped the notice of the trial court until the time came for the framing of issues, though the plaintiff took care to add what might be termed a residuary prayer for relief, which would cover any kind of relief which could be granted by the court. The Taxing Officer thought that because the plaint was so drawn up that it would not appear on the face of it that this was really a title suit in the guise of a partition suit, ad valorem court-fee could not properly be demanded from the plaintiff. It has not ordinarily been the practice in this High Court, from the time of its foundation, to depend exclusively on the averments of the plaintiff for the ascertainment of what should be the proper court-fee payable; to permit a plaintiff to escape liability by a vague and indefinite statement of facts in the plaint, or to penalize him because he may possibly ask for a declaration which may be unnecessary. From the institution of the Patna High Court the Stamp Reporter and the Taxing Officer, acting under the directions from time to time given by the Taxing Judge, have followed what is, in my judgment, the correct procedure in this matter; determining the proper court-fee payable on an appreciation of what the plaintiff-appellant really sought, not requiring payment of ad valorem court-fee merely because a suit for partition was defended by a claim of adverse possession; but astute to see that plaintiffs should not avoid liability to pay court-fee under section 7(*iv*) (*c*) or section 7(*v*) of the Act merely by omitting to assert a prayer for possession in what was essentially a title suit in the guise of a partition suit.

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The Taxing Officer has suggested that ad valorem court-fee should be payable on the memorandum of appeal on the value of the plaintiff's share on every item of property of which he has been found to be out of possession by the trial court. The learned Government Pleader cites the decision in *Sukha Nand v. Musammatt Shiva Devi*⁽¹⁾ and *Peshauri Lal v. Jai Kishan Das*⁽²⁾. In each of those cases the appellant claimed that a higher valuation should have been placed on a particular property so as to increase the cash equivalent of his share in those items of property which is a different matter from that which we have now before us.

Mr. Janak Kishore suggests that it would not be proper to exact ad valorem court-fee before this Court has arrived at a decision on the appeal on the question of fact, relying upon the decision of Sir Carleton King as Taxing Judge of the Allahabad High Court in *Jai Pratap Narain v. Rabi Pratap Narain*⁽³⁾; but the practice therein described has never been followed in this High Court. Where it has been found by this Court that the plaintiff-appellant ought prima facie to pay ad valorem court-fee on a portion of his claim, he has been required to pay the ad valorem court-fee on his memorandum of appeal before admission of the appeal in the High Court. It is not within my province to say whether the Subordinate Judge ought to have required payment of ad valorem court-fee before the trial of the suit in respect of the estates in possession of Musammatt Sanjho Kuer; but it appears clear that ad valorem court-fee is properly payable on the value of these estates before the memorandum can be admitted in this Court, and to that extent I agree with the learned Taxing Officer. Ad valorem court-fee under section 7 (v) of the Court-fees Act is payable on the memorandum of appeal in respect of the share claimed by the plaintiff in Akbarpur Rani tauzi no.

(1) (1935) A. I. R. (Lah.) 14.

(2) (1931) 142 Ind. Cas. 829.

(3) (1930) I. L. R. 52 All. 756.

1213, Srikishunpur tauzi no. 9190 and Mathura Sri Ram tauzi no. 8902. The valuation on which court-fee has to be assessed can be ascertained if extracts from Register D or land revenue chalans relating to these estates are on the record; otherwise the appellant may be required to demonstrate what is the revenue payable in respect of each of the three estates, or what may be their market value, if revenue has not been assessed.

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Order accordingly.

J. K.

APPELLATE CRIMINAL.

Before Khaja Mohamad Noor and Madan JJ.

EMPEROR

v.

1937.

May, 3.

JUGAL KISHORE TEBERAWALLA.*

*Boilers Act, 1923 (Act V of 1923), sections 2 and 23—
“owner” meaning of—appeal against acquittal.*

The definition of “owner” in section 2 of the Act is inclusive, that is to say, it extends the dictionary meaning of the word and does not restrict it. It says that the “owner” includes any person using a boiler as agent of the owner thereof and any person using the boiler which he has hired or obtained on loan from the owner thereof. The definition does not mean that an owner of a boiler who uses it through his agent is not its owner for the purposes of the Act. The only effect of this inclusive definition is that an agent who uses a boiler owned by his principal and who under the ordinary meaning of the term is not its owner, comes under the Act.

Held, therefore, that an absentee owner of a boiler, which is being used for his work comes within the purview of section 23 of the Indian Boilers Act, which makes the owner of a boiler liable for its use without a certificate.

*Government Appeal no. 2 of 1937 against an order of acquittal, dated the 3rd of November, 1936 passed by Mr. Shyam Narain Sinha, Magistrate, 1st class of Dhanbad.