

Parties will bear their own costs of this appeal.

CHATTERJI, J.—I agree.

Appeal dismissed in limine.

S. A. K.

REVISIONAL CIVIL.

Before James and Rowland, JJ.

SITAL PRASAD SAH

v.

RAMDAS SAH.*

Court-Fees Act, 1870 (Act VII of 1870), section 7, sub-sections (iii), (iv)(c) and (v)—partition suit partaking of the nature of title suit—plaintiff out of possession of a portion of the subject-matter—ad valorem court-fee payable on the amount by which plaintiff's share in possession is of less value than the share claimed.

So far as a partition suit may actually be in the nature of a title suit, ad valorem court-fee is payable by the plaintiff whether the suit is regarded as governed by section 7 (iv)(c) or by sub-section (iii) or (v) of section 7 of the Court-Fees Act, 1870.

Rachhya Raut v. Musst. Chando(1), followed.

Where the plaintiff is out of possession of a portion of the property of which he seeks partition, he has to pay ad valorem court-fee on the amount by which his share in possession is stated to be of less value than the share which he claims.

Dip Chand Rai v. Chhetru Lal(2) and *Sundara Ganapathi Mudali v. Daivasikamani Mundali*(3), followed.

Hara Gowri Saha v. Dukhi Saha(4), distinguished.

*Civil Revision no. 652 of 1938, from an order of Babu Anugrah Narain, Subordinate Judge of Muzaffarpur, dated the 21st September, 1938.

(1) (1921) 6 P. L. J. 662.

(2) (1917) 1 Pat. L. T. 529.

(3) (1930) 129 Ind. Cas. 824.

(4) (1910) 5 Ind. Cas. 582.

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Application in revision by the plaintiff.

The facts of the case material to this report are set out in the judgment of the Court.

B. C. De and *K. K. Banarji*, for the petitioner.

N. K. Prasad II and *A. N. Lal*, for the opposite party.

JAMES AND ROWLAND, JJ.—The plaintiff instituted a suit for partition alleging that his uncle Ramdas Sah had recently made a partition of a portion of the family property which had been unfair. He alleged that a house had been allotted to him which no longer belonged to the joint family; that certain other property made over to him had been overvalued; that certain bad debts had been made over to him and that the partition had generally been unfair. He estimated his loss due to this unfair partition at Rs. 8,775-8-6. Schedule B of the plaint contained the description of property still held by the family as tenants in common. The plaint bore a court-fee stamp of Rs. 15; but the Subordinate Judge considered that the suit ought to have been treated as falling under section 7(iv)(c) of the Court-Fees Act and he required the plaintiff to pay ad valorem court-fee on the whole value of the property contained in schedule A of the plaint. The learned Subordinate Judge in coming to this conclusion followed what he considered to be the effect of the decision in *Hara Gowri Saha v. Dukhi Saha*(¹). The plaintiff applies for revision of that order on the ground that his case cannot properly be treated as falling under section 7(iv)(c) of the Court-Fees Act. Since the decision in *Ramkhelawan Sahu v. Bir Surendra Sahu*(²) it can no longer be argued that this Court has no jurisdiction to enter into this question in revision where the decision of the court below on the question of the classification of the suit has been adverse to the plaintiff.

(1) (1910) 5 Ind. Cas. 582.

(2) (1937) I. L. R. 16 Pat. 766.

Mr. B. C. De on behalf of the plaintiff argues that the effect of that decision would be to remove this suit from the category of a suit for declaration with consequential relief; because some attempt was made in that decision to define the kind of declaration which is affected by sub-section (c) of section 7(iv). It appears to us that it makes little practical difference whether the suit is to be regarded as a suit for a declaration with consequential relief or as a suit for the possession of moveable and immoveable property governed by sub-sections (iii) and (v) of section 7, since in the courts of Bihar and Orissa where the consequential relief sought is recovery of possession of land the plaintiff is not permitted to value that land at a lower rate than would be assessed under section 7(v).

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In the present case the plaintiff states that he is in possession of what purports to be his share in the property in schedule A; but that the property of which he is in possession is of less value than the property to which he is entitled. In *Hara Gowri's* case⁽¹⁾ the plaintiff sought to set aside a decree for partition and the court held that ad valorem court-fee was payable. In the present case there is no decree and the plaintiff alleges that the only instruments of partition were an unregistered deed and some unregistered chithas. Whether these documents would be admissible in evidence or not, we need not say at this stage; but the plaintiff asks that the partition should be set aside and so a parallel might be found with the facts in *Hara Gowri's* case⁽¹⁾. The learned Subordinate Judge interpreted that decision as implying that court-fee was to be paid on the whole value of the property which was to be brought under partition, though there is nothing in the decision which implies that this was the intention of the court. The learned Subordinate Judge mentioned a decision of the Madras High Court in *Sundara Ganapathi Mudali v. Davasikamuni Mundali*⁽²⁾ where the difference between the value of the properties allotted

(1) (1910) 5 Ind. Cas. 592.

(2) (1930) 129 Ind. Cas. 824.

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to the plaintiff in a partition and the value which he claimed was treated as the value of the suit for the purposes of court-fee. The learned Subordinate Judge considered that he was bound by the decision of the Calcutta High Court; but, as we have said, there is nothing to indicate in the Calcutta case on what basis the ad valorem court-fee was to be calculated. It is suggested on behalf of the respondent that court-fee ought to be calculated on the value of the plaintiff's share in the properties contained in schedule A; but it appears from the plaint that the plaintiff is already in possession of a share which is approximately what he claims though in deficit by Rs. 8,775. In *Dip Chand Rai v. Chhetru Lal*(¹) the Taxing Judge of this Court was dealing with a partition suit in which the plaintiff was out of possession of a portion of the property of which he sought partition. The direction of the Taxing Judge amounted to this that the plaintiff had to pay ad valorem court-fee on the amount by which his share in possession was stated to be of less value than the share which he claimed; and that so far as he was in possession of an adequate share, no ad valorem court-fee was payable. It has always been held in this Court that so far as a partition suit may actually be in the nature of a title suit ad valorem court-fee is payable by the plaintiff whether the suit is regarded as governed by section 7(iv)(c) or by sub-section (iii) or (v) of section 7. We need only cite the decision in *Rachhya Raut v. Musst. Chando*(²).

The petition will accordingly be allowed to this extent that the order of the Subordinate Judge requiring the payment of ad valorem court-fee on the sum of Rs. 85,294 is set aside. The plaintiff has to pay court-fee on the amount by which his share in possession is in deficit of the share which he claimed, namely, on Rs. 8,775-8-6. We make no order for costs.

Order accordingly.

S. A. K.

(1) (1917) 1 Pat. L. T. 529.

(2) (1921) 6 Pat. L. J. 662.