## APPELLATE CIVIL

*Before Mr. M. C. Chagla, Chief Justice.*

IRAPPA BOMMANEPPA KALKERI AND ANOTHER (ORIGINAL PLAINTIFFS) PETITIONERS *v.* IRAPPA AMARAPPA KALKERI AND ANOTHER (ORIGINAL DEFENDANTS) OPPONENTS.*

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*Court Fees Act (VII of 1870), s. 7 (iv) (b) (c) and (2)—Suit by a coparcener that he be put in joint possession with the alienee of joint property—Amount of Court fees payable.*

*Held,* that a suit by a Hindu coparcener for a declaration that an alienation by another coparcener is not binding on him, and that he be put in joint possession with the alienee is in substance a suit for joint possession although in form it is one for a declaratory decree and consequently it does not fall under s. 7 (*iv*) (*c*) of the Court-Fees Act, 1870.

There is a distinction between a suit filed by a coparcener against an alienee for partition and possession of his share and a suit filed by a coparcener which is neither for partition nor for a specific share in the property but one merely for joint possession with the alienee. The former suit is a suit for possession and ejectment to the extent of the share claimed by the plaintiff; the latter is a suit for joint possession and not for ejectment. A suit of the second class falls under s. 7 (*iv*) (*b*) and not under s. (*v*) of the Court Fees Act, 1870.

*Shankar Maruti* v. *Bhagwant Gunaji,*[1] relied upon.

*Dagdu Sakharam* v. *Totaram,*[2] *Kalianna Goundar* v. *Balasubramaniam,*[3] *Kandaswami* v. *Annamalai,*[4] *Hashim Ali Khan* v. *Hamidi Begum,*[5] and *Dwarka Das* v. *Krishna Kishore,*[6] referred to.

CIVIL REVISION APPLICATION from the decision of K. N. Patil, Civil Judge, Junior Division, Bagalkot.

The facts are set out in the judgment.

*V. V. Albal* with *G. N. Vaidya,* for the petitioners.

*K. G. Datar,* for the opponents.

*Chagla C. J.* This revision application raises a question as to the payment of Court-fees.

Petitioners Nos. 1 and 2 and one Gurusangappa are brothers, and in 1949 Gurusangappa sold a family house to the first opponent. The petitioners have filed a suit for a declaration that the sale-deed executed by their brother is not binding on them and for recovering joint possession of their two-thirds share. The contention in the Court below was that the suit fell

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* Civil Revision Application No. 1578 of 1951.

(1) (1946) 49 Bom. L. R. 72, F.B.
(2) (1909) 11 Bom. L. R. 1074.
(3) [1947] A. I. R. Mad. 237.
(4) [1949] A. I. R. Mad. 105.
(5) [1942] A. I. R. Cal. 180.
(6) (1921) 2 Lah. 114.

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under s. 7 (*iv*) (*c*) of the Court fees Act. In other words, the contention was that this was a suit for a declaratory decree where a consequential relief was prayed for. The learned trial Judge held that the suit was for possession and it fell under s. 7 (*v*), and, therefore, the Court-fees had to be paid on an *ad valorem* basis.

Mr. Albal, before me, has contended that, if the suit did not fall under s. 7 (*iv*) (*c*), it fell under s. 7 (*iv*) (*b*), in which case also the Court-fees payable would not be an *ad valorem* basis. Now, the principle which should be applied to this case has been clearly stated in the Full Bench decision reported in *Shankar Maruti* v. *Bhagwant Gunaji*[1]. That was a suit for partition of joint Hindu family property, and what that case laid down was that, inasmuch coparceners were in constructive possession of all the joint family property, when a suit for partition was filed it could not be said that it was a suit for possession. It was pointed out that a suit for possession within the meaning of s. 7 sub-cl. (*v*) was a suit where the plaintiff was dispossessed and he was seeking to eject the defendant and to recover possession. Therefore, if the plaintiff was already in possession, either actual or constructive, then the suit could not fall under s. 7 (*v*). Now, it is clear that the present suit does not fall under s. 7 (*iv*) (*c*) because, although a declaratory decree is sought for, it was not necessary for the plaintiffs in this suit to ask for the declaratory decree in order to get the consequential relief which they have sought. The consequential relief is the main and substantial relief in the suit and the plaintiffs could have got the consequential relief without asking the Court to give them the declaration which they have asked. As a member of the joint family, it was open to them to ignore the alienation made by one of the coparceners, and as an alienation of this character is voidable the very fact that the non-alienating coparceners filed a suit to challenge the alienation amounts to the voidance of the alienation. Therefore, although in form the suit is for a declaratory decree, in substance the suit is for joint possession of the two-thirds share belonging to the plaintiffs.

The next question that falls for determination is whether this is a suit for possession within the meaning of s. 7 (*v*) as contended by Mr. Datar, or it is a suit falling under s. 7 (*iv*) (*b*) to enforce the right of the plaintiffs to share in property on the ground that it is joint family property. Now, Mr. Albal's

[1] (1946) 49 Bom. L. R. 72, F. B.

contention is that all that he wants in this suit is to be put into joint possession with the defendants. Mr. Albal says that he does not want actual or specific possession of his two-thirds share. In other words, he does not want a partition of the property. The right that he wishes to enforce is the right of a member of a joint family and that right is to be in joint possession either with his other coparceners or with the strangers in whose favour the alienating coparcener has alienated the property. Now, in a case like this, two possible positions might arise. A non-alienating coparcener may file a suit claiming his share against the purchaser and asking for partition and for possession of his share on partition. It is well settled that in Bombay it is open to non-alienating coparceners to sue the purchaser for partition of the alienated property without bringing a suit for general partition, and Mr. Datar says that this is exactly the position in this case. The plaintiffs are the non-alienating coparceners and they have filed the suit for partition against the purchasers claiming possession of their two-thirds share. If that be the position, then undoubtedly the suit would fall under s. 7 (*v*); because the plaintiffs have been deprived of their possession of their two-thirds share, they are seeking to eject the defendants from their two-thirds share and to obtain possession of their two-thirds share. It is not the case of the plaintiffs that they were ever in possession of the two-thirds share in the property, either actually or constructively. If that were the position here, then no difficulty would arise and the suit would clearly fall under s. 7 (*v*) of the Court-fees Act. The learned Judge below has taken that view, and I do not blame him because the plaint in the suit is capable of that interpretation. But Mr. Albal, appearing for the plaintiffs, states that the plaintiffs do not want partition of the property and that they do not want specific possession of their two-thirds share. He says that all that they want is to be put into joint possession with the defendants and they want a declaration that they are entitled to their two-thirds share; and if that be the true position arising on the plaint, he says that the suit would then fall under s. 7 (*iv*) (*b*). Now, the matter frankly is not free from difficulty. On the one hand, it is contended by Mr. Datar that, even if the plaintiffs were seeking joint possession, and even if the possession sought was not specific or actual possession but mere symbolic possession, the matter

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would fall under s. 7 (*v*) because s. 7 (*v*) deals with all suits for possession irrespective of whether the possession sought was actual or symbolic. On the other hand, it is contended by Mr. Albal that, where a coparcener does not ask for partition and for possession of his specific share by partition, all that he is doing is enforcing his right to share in the property on the ground that it is joint family property. By reason of the fact that it is joint family property, the plaintiffs say that they are entitled to be jointly in possession with the defendants. They are not asking for any share in the property; they are not asking for any possession of the property; all that they are contending for is that they have a right to share in that property, and the manner in which they are enforcing that right is by asking for a decree for joint possession. In my opinion, there is considerable force in Mr. Albal's contention.

Reliance has been placed by Mr. Datar on a judgment of this Court in *Dagdu Sakharam* v. *Totaram*[1], and the observations of Mr. Justice Batchelor as to the true meaning of s. 7 (*iv*) (*b*). The learned Judge rightly points out that the whole of sub-s. (*iv*) of s. 7 deals with abstract rights which are not capable of valuation, and, therefore, the right referred to in s. 7 (*iv*) (*b*) must be an abstract right; and he also points out that s. 7 (*iv*) (*b*) refers to a suit to enforce the right to 'share' in property, not the right to 'a share' in property, and in that particular case Mr. Justice Batchelor held that the suit did not fall under s. 7 (*iv*) (*b*). Now, it should be borne in mind that that was a suit for partition and separate possession of joint family property, not a suit merely for a right to joint possession. Mr. Albal says that this decision has been over-ruled by the Full Bench decision in *Shankar Maruti* v. *Bhagwant Gunaji.*[2] This decision has been over-ruled by the Full Bench decision only to the extent that Mr. Justice Batchelor held that a suit for partition did not fall under s. 7 (*iv*) (*b*), but fell under s. 7 (*v*). What the Full Bench held was that a suit for partition did not fall under s. 7 (*v*), but fell under Sch. II, art. 17. Therefore, the Full Bench did not agree with the *sequiter* drawn by Mr. Justice Batchelor from the fact that a suit for partition did not fall under s. 7 (*iv*) (*b*). The Full Bench did not disagree with the view of Mr. Justice Batchelor that a partition suit does not fall under s. 7 (*iv*) (*b*). But when Mr. Justice Batchelor took the view that, because a suit for partition does not fall under s. 7 (*iv*) (*b*), therefore it falls

(1) (1909) 11 Bom. L. R. 1074. (2) (1946) 49 Bom. L. R. 72.

under s. 7 (*v*), the Full Bench disagreed. But, as I have just pointed out, the decision in *Dagdu Sakharam* v. *Totaram*,[1] is distinguishable because that was a suit for partition, and this argument proceeds on the basis that the present suit is not a suit for partition.

Then Mr. Datar has relied on two Madras decisions in *Kalianna Goundar* v. *Balsubramaniam*[2] and *Kandaswami* v. *Annamalai*.[3] Both those cases were suits for partition. In *Kalianna Goundar* v. *Balasubramaniam*, the suit was filed by the sons to challenge an alienation made by the father, and it was held that the suit fell under s. 7 (*v*); but that was a suit specifically for partition and for recovery of the properties alienated by the father. In *Kandaswami* v. *Annamalai*[3] also, the suit was by the sons against the alienee, asking for partition of the property and for possession of their shares. Mr. Datar has also relied on a decision of the Calcutta High Court reported in *Hashim Ali Khan* v. *Hamidi Begum*.[4] What is relied on is the observation of Mr. Justice Mitter at page 200, where the learned Judge says

> "But if he was not at the date of the suit in actual possession of any item of the property claimed as joint and the defendant is in actual possession of the whole on the assertion of a hostile title known to the plaintiff, a suit for partition is not maintainable, on a fixed Court-fee of Rs. 15, but a suit for possession, either joint possession or possession after partition, must be brought on payment of *ad valorem* Court-fees."

Now, this decision is not of much help because, as pointed out in the Full Bench decision in *Shankar Maruti* v. *Bhagwant Gunaji*[5] at page 80, there is an amendment in the Bengal Court-fees Act. An amendment was made to the Bengal Court-fees Act in 1935, by which a new clause was added, being cl. (*vi*) (A), whereby *ad valorem* duty had to be paid in suits for partition and separate possession of a share of joint family property or of joint property, or to enforce a right to "a share" in any property on the ground that it is joint family property or joint property, if the plaintiff has been excluded from possession of the property in which he claims to be a coparcener or co-owner, in all these cases, the Court-fee is to be according to the market-value of the share in respect of which the suit was instituted. It is true that the Calcutta case is a case of Mahomedans. But if this observation is to

(1) (1909) 11 Bom. L. R. 1074.
(2) [1947] A. I. R. Mad. 237.
(3) [1949] A. I. R. Mad. 237.
(4) [1942] A. I. R. Cal. 180.
(5) (1946) 49 Bom. L. R. 721, F.B.

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be applied to a case of joint family property, then it must not be overlooked that, as far as joint family property is concerned, the law in Bengal is different from the law here.

Mr. Albal has relied on a judgment of the Lahore High Court in *Dwarka Das* v. *Krishan Kishore*(1) where there was a suit similar to the one here, and all that was sought was joint possession of the property alienated; and the Court held that, in such a case, the suit was to enforce the right to share in joint family property and, therefore, fell under s. 7 (*iv*) (*b*) and the Court has distinguished the case of *Dagdu Sakharam* v. *Totaram*(2) on the ground that that was a suit for partition and for possession of a definite share of joint property.

But apart from authorities, it seems to me on principle sound that a distinction should be made between a suit filed by coparceners against an alienee for partition and possession of their shares, and suits filed by coparceners, not asking for partition, not asking for their specific share in the property, but merely asking for joint possession with the alienee. In the first case, it is clearly a suit for possession; it is a suit in ejectment to the extent of the share claimed by the plaintiffs. In the second case, the plaintiffs are not seeking to eject the alienee at all; all that they want is to enforce their right as members of the joint family to share in the possession with the alienee. In my opinion, the second case falls under s. 7 (*iv*) (*b*), and not under s. 7 (*v*). But as the plaint in this case is equivocal, and as the learned Judge has taken a particular view of the plaint, if Mr. Albal wants his case to fall under s. 7 (*iv*) (*b*), he must make it perfectly clear in the plaint that he is not asking for partition, but he is merely asking for joint possession with the defendants. I would, therefore, give leave to Mr. Albal to suitably amend the plaint so as to make the position perfectly clear. If the plaint is suitably amended, then I direct that the learned Judge should charge the Court-fees on the suit as falling under s. 7 (*iv*) (*b*), and not under s. 7 (*v*).

The plaint to be amended within a fortnight of the receipt of this order by the trial Court.

No order as to costs.

*Order accordingly.*

K. B. S.

(1) (1921) 2 Lah. 114.

(2) (1909) 11 Bom. L. R. 1074.