

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 4841 OF 2016

RAHIMODDIN NAIMODDIN KAZI
VERSUS
SAYYEDA ASEMABEGUM NAIMODDIN KAZI AND OTHERS

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Advocate for Petitioner : Shri S.A.Wakure
Advocate for Respondent 9 : Shri Amol Joshi
h/f Shri R.S.Deshmukh
Advocate for Respondents 15 & 20 : Shri P.D.Sangwkar
Advocate for Respondents 18 & 27 : Shri S.P.Dhoble
AGP for Respondents 31 & 32 : Shri S.P.Deshmukh

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CORAM : RAVINDRA V. GHUGE, J.
Dated: June 08, 2017

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PER COURT :-

1. The petitioner is aggrieved by the order dated 30.2.2016 passed by the trial Court below Exhibit 62, by which, the petitioner / plaintiff is directed to pay Court fees in terms of Section 6(iv)(ha) of the Bombay Court Fees Act.
2. This Court, while issuing notice on 27.4.2016, has granted interim relief in terms of prayer clause (C) and as such the suit is still pending.
3. I have considered the submissions of the learned counsel for the petitioner and the respondents at length.

4. Issue is as to whether the petitioner is only seeking a declaration that the Registered Deed of Power of Attorney and sale deeds are not binding upon the plaintiff. The suit is for partition, declaration and the plaintiff claims 1/6th share to be allotted to him from the suit land admeasuring 1 acre and 20 gunthas (60 Ares).

5. Contention of the petitioner is that the petitioner is not seeking possession of any portion of the suit property. He is only seeking a declaration that the Registered Deed of Power of Attorney and sale deeds be declared as not binding upon him and hence he needs to pay court fees of Rs.19.50 under Article 17(ii) of the Schedule II to the Court Fees Act.

6. Per contra, the submissions of the defendants are that the plaintiff is not merely seeking a declaration but, is specifically seeking allotment of 1/6th share. After the suit is decreed, if the plaintiff is held entitled to 1/6th share of the suit land, the procedure laid down under the Maharashtra Land Revenue Code will have to be followed and pursuant to the demarcation of shares and issuance of *taba pavati*, the plaintiff will have to be put in possession of a specific portion of the suit land. As such, the plaintiff has shrewdly avoided putting forth a prayer for being put in possession of the 1/6th

share, which would be inevitable after the suit is decreed.

6. The Honourable Supreme Court has dealt with a similar Suhrid Singh @ Sardool Singh Vs. Randhir Singh and others [AIR 2010 SC 2807]. Paragraph No.6 of the said judgment would be material and which reads as under:-

“6. Where the executant of a deed wants it to be annulled, he has to seek cancellation of the deed. But if a non-executant seeks annulment of a deed, he has to seek a declaration that the deed is invalid, or non-est, or illegal or that it is not binding on him. The difference between a prayer for cancellation and declaration in regard to a deed of transfer/conveyance, can be brought out by the following illustration relating to 'A' and 'B' -- two brothers. 'A' executes a sale deed in favour of 'C'. Subsequently 'A' wants to avoid the sale. 'A' has to sue for cancellation of the deed. On the other hand, if 'B', who is not the executant of the deed, wants to avoid it, he has to sue for a declaration that the deed executed by 'A' is invalid/void and non- est/ illegal and he is not bound by it. In essence both may be suing to have the deed set aside or declared as non-binding. But the form is different and court fee is also different. If 'A', the executant of the deed, seeks cancellation of the deed, he has to pay ad-valorem court fee on the consideration stated in the sale deed. If 'B', who is a non-executant, is in possession and sues for a declaration that the deed is null or void and does not bind him or his share, he has

to merely pay a fixed court fee of Rs. 19.50 under Article of Second Schedule of the Act. But if 'B', a non-executant, is not in possession, and he seeks not only a declaration that the sale deed is invalid, but also the consequential relief of possession, he has to pay an ad-valorem court fee as provided under Section 7(iv)(c) of the Act. Section 7(iv)(c) provides that in suits for a declaratory decree with consequential relief, the court fee shall be computed according to the amount at which the relief sought is valued in the plaint. The proviso thereto makes it clear that where the suit for declaratory decree with consequential relief is with reference to any property, such valuation shall not be less than the value of the property calculated in the manner provided for by Clause (v) of Section 7.”

7. *Prima facie*, it, therefore, appears that though the plaintiff has not specifically sought handing over of possession, the suit for partition would eventually lead to demarcation of shares of the entitled litigants and each one of them would then be placed in possession of that portion / share of the suit property. At this stage, therefore, I do not find that the trial Court has committed any error in allowing application Exhibit 62 filed by defendant No.9 under Order VII Rule 11 of the CPC, by which the trial Court has directed the plaintiff to pay appropriate Court fee under Section 6(iv)(ha).

8. During the course of arguments, it has fallen from the learned Advocates for the respective sides that, at best, the petitioner / plaintiff may seek refund of the court fees by following the procedure as is laid down in law, in the event, it is established that he is already in possession of the particular share and he is not required to be put in possession after the suit is decreed. As such, this aspect is left open and the plaintiff may then take recourse to appropriate procedure / remedy if provided in law.

(RAVINDRA V. GHUGE, J.)

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