

In The High Court at Calcutta
Civil Appellate Jurisdiction
Appellate Side

Present:

The Hon'ble Justice Md. Shabbar Rashidi

C.O. No. 2319 of 2019
With
CAN 1 of 2019 (Old CAN 9795 of 2019)

Miss Natasha Sarkar & Another
Vs
Smt. Simla Singh & Others

For The Petitioners : Mr. Ayanava Bhattacharya, Adv.
: Mr. Pawan Kumar Gupta, Adv.
: Ms. Sofia Nesar, Adv.
: Mr. Sankha Subhra Chaky, Adv.

For The Opposite Party

No. 1 to 4 : Mr., Achyut Basu, Adv.
: Ms. Punam Basu, Adv.
: Ms. Pritha Biswas, Adv.
: Mr. Amritansu Sengupta, Adv.

Heard On : January 17, 2025

Judgment On : January 31, 2025

Md. Shabbar Rashidi, J.

1. The instant revisional application is in assailment of an order dated May 27, 2019 passed by the 1st Court of learned Civil Judge (Senior Division), Midnapur, in Title Suit No. 52 of 2017.
2. By the impugned order learned trial court rejected an application filed on behalf of the petitioners/defendant Nos. 7 & 8 seeking rejection of the plaint filed by Opposite Party Nos. 1 to 4/Plaintiffs on the ground of non-maintainability of the Title Suit for undervaluation and non-payment of ad-valorem court fee.
3. The Opposite Party Nos.1 to 4 herein filed a suit for partition against Defendant Nos. 1 to 6 in the suit being Title Suit No. 52 of 2017. In the said suit, the plaintiffs therein claimed to be legal heirs of the original owner of the suit property together with Defendant Nos. 1 to 6 therein.
4. The present Petitioners are Defendant Nos. 7 & 8 in the said suit. The aforesaid Defendants/Petitioners purchased a portion of the suit properties by dint of two registered sale deeds said to be executed by the other co-sharers, i.e. Defendant nos. 1 to 6 for a total consideration ₹.5352500/-.

5. The contesting Defendant Nos. 1 to 6 appeared in the suit and filed written statement denying therein the plaintiffs to be their co-sharers as the married daughters of the original owner.

6. Subsequently the present Petitioners being Defendant Nos. 7 & 8 in Title Suit no.52 of 2017 entered appearance in the suit and filed their written statement. By the written statement filed on behalf of these petitioners, the present Petitioners/Defendant Nos. 7 & 8 raised a counterclaim in the suit praying for declaration of their right and title over the suit properties on the basis of the alleged two sale deeds said to be executed by Defendant Nos. 1 to 6.

7. On January 16, 2018, the present Petitioners as defendant nos. 7 & 8 in Title Suit No. 52 of 2017 filed an application under Order VII Rule 11(b) of the Code of Civil Procedure praying inter alia for direction upon the plaintiff to pay ad-valorem court fee in terms of their prayer in the Title Suit within a specified period failing which, the learned trial court was called upon to reject the plaint in terms of the provision under Order VII of the Code of Civil Procedure.

8. The Plaintiff in the suit filed a written objection against such application and the learned trial court proceeded to decide the maintainability of the suit in the teeth of such application.

9. It has been submitted on behalf of the Opposite Party Nos. 1 to 4/plaintiffs that they are the married daughters of original owner Bachchu Lal Shankar. The Petitioners submit that the partition suit being Title Suit no. 52 of 2017 was filed by Opposite Party Nos. 1 to 4 mainly challenging the execution and validity of two sale deeds said to be executed by defendant nos. 1 to 6 in favour of the present Petitioners/Defendants No. 7 & 8. The plaintiffs also prayed for setting aside the said two sale deeds besides praying for partition of the suit property amongst the plaintiffs as well as defendant nos. 1 to 6. It is submitted on behalf of the petitioners that unless and until the trial court decides the validity of the two deeds executed in favour of the petitioners, issue of partition cannot be decided. Moreover, according to the petitioners, the plaintiffs/Opposite Party Nos. 1 to 4 have not been in possession of these suit properties, they were required to pay ad-valorem court fee on the amount stated as consideration many in the two sale deeds.

10. By the impugned order, the learned trial court upon considering the facts and circumstances of the case rejected the application filed on behalf of the present petitioners holding that the suit was not undervalued and was filed with proper court fee. It is such order which has been assailed in the present proceeding.

11. It has been submitted by the petitioners that the learned trial court did not consider the Title Suit filed by the plaintiffs/Opposite Party Nos.1 to 4 for partition of the suit properties. Such suit cannot proceed without setting aside/cancellation of the two sale deeds standing in the name of the petitioners and that such petitioners have already come into the possession thereof. The plaintiffs are apparently not in possession, they cannot ask for partition without praying for possession as well as cancellation of the sale deeds.

12. Learned advocate for the petitioners also submitted that the suit filed by Opposite Party nos.1 to 4 is palpably undervalued in so far as prayer (c) of the plaint, i.e. setting aside/cancellation of the deeds standing in the name of petitioners. In view of such prayer, the plaintiffs were required to pay ad valorem court fee on the consideration amount explicit in the said deeds. It was submitted

that the learned trial court ought to have directed an enquiry in terms of Section 11 of the West Bengal Court Fees Act, 1970 and would have directed the plaintiffsto deposit the deficit court fee within a reasonable time and on their failure to do so, the plaint was liable to be rejected.

13. In support of such contention, learned advocate for the petitioners relied upon **(2010) 12 Supreme Court Cases 112 (Suhrid Singh @ Sardool Singh v. Randhir Singh & Ors), All India Reporter 1973 SC 2384 (Shamsher Singh v. Rajinder Prashad & Ors), All India Reporter 1945 Lah 13 (Prithvi Raj & Anr. v. D. C. Ralli & Ors.), All India Reporter 1943 Nag 70 (Vinayakrao Anandrao Mankar Kunbi v. Mt. Mankunwarbai w/o R.S. Gopikisan Marwadi & Ors.), (1987) 1 CHN 30 (Nasiruddin Mallick & Ors. v. Abdul Aziz Mallick & Ors) and 2019 (1) ICC 784 (Karn) (C. Janakamma v. Dr. C.L. Narayana & Anr).**

14. Learned advocate for Opposite Party Nos. 1 to 4 reiterated that the aforesaid opposite parties are legal heirs of the original owner and as such co sharer in the suit property. In such, capacity, they have filed Title Suit No 52 of 2017 for partition of the joint properties. He submits that the valuation of a suit solely depends

upon the reliefs claimed in the suit. A defendant has nothing to do with the valuation of the suit. It is the court who is to decide on such valuation. On such proposition, learned advocate for the Opposite Party Nos. 1 to 4 have relied upon **1961 SCC OnLine SC 280 (Sri Rathnavarmaraja v. Vimla Smt)** and **2014 SCC OnLine Cal 20115 (Kanai Lal Dutta v. Babu Das Bairagya)**.

15. It is further submitted by learned advocate for the aforesaid opposite parties that the undervaluation of suit and the quantum of court fee to be paid are completely between the court and the plaintiff. Defendant has practically no say in this regard. A plaint cannot be rejected on the basis of allegations made out in the written statement. In support of such contention, learned advocate for O.P. Nos. 1 to 4 relied upon **(1980) 2 Supreme Court Cases 247 (Neelavathi & Ors. v. N. Natarajan & Others)**.

16. It was also submitted that the plaintiffs in Title Suit No. 52 of 2017 primarily asked for partition together with consequential reliefs. The plaintiffs, being in or not in possession of the suit properties is of no consequence in so far as possession of one co sharer is deemed to be possession of all the co sharers. In that view no statement whatsoever has been made in the plaint that the

plaintiffs/O.P. Nos. 1 to 4 are not in possession. The plaintiffs have asked for partition by metes and bounds along with separate possession. For such reason, the plaintiffs are under obligation to pay fixed court fee and not an ad valorem court fee. In support of such contention, reliance is placed on **2008 SCC OnLine Cal 63 (Kalipada Kirtan v. Bijoy Bag & Ors)**.

17. It was also submitted that Opposite Party Nos. 6 to 10 (Defendant Nos. 1 to 6) fraudulently executed the deeds in favour of the Defendant Nos. 7 & 8/ petitioners, in respect of the suit properties where the plaintiffs (O.P. Nos. 1 to 4) had vested undivided interest. The petitioners, on the basis of such deeds, cannot acquire title in the suit properties, better than what their vendors held. By filing the Title Suit the plaintiffs have asked for partition of the suit properties upon declaration of their undivided share therein. The plaintiffs have not prayed for any relief with regard to cancellation of such deed. A mere declaration that such deeds were illegal, vitiated by fraud and misrepresentation and not binding upon the plaintiffs, will not require an ad valorem court fee.

18. As noted, O.P. Nos. 1 to 4 filed Title Suit No. 52 of 2017 before the trial court seeking partition of the joint properties by metes and

bounds and for carving out separate share therein upon declaration of their share. The aforesaid opposite parties claimed to be descendants of common ancestor i.e. married daughters of the erstwhile owner having undivided share in the suit properties being possessed jointly with other co sharers i.e. Opposite Party Nos. 5 to 10. The aforesaid opposite parties, transferred certain joint properties in favour of the petitioners by two registered deeds of conveyance.

19. The bone of contention in the present proceeding is prayer (c) of the plaint filed on behalf of the plaintiffs (O.P. Nos. 1 to 4). The reliefs sought in the said Title Suit are reproduced here :

15. That for the purpose of determining the jurisdiction of the Court and Court Fees the suit is valued at ₹. 61, 100/- being for partition and fixed court fee of ₹. 80/- is paid and on the payment of proper Court Fees, the plaintiff prays: -

(a) That on declaration of 1/6th share of each the plaintiffs in the Suit property, the same may be partition from the share of the Defendants by a preliminary decree and decree of separate possession may be passed;

- (b) *That in case the Defendants failed to partition within the time so fixed by the Court, a survey passed lawyer of this court may be appointed as partition Commissioner and on the basis of the report of the partition Commissioner the final decree may be passed;*
- (c) ***That it may be declared that the two Sale Deeds as in Schedule A 1 below in the name of Defendant Nos. 7 & 8 are illegal and vitiated by fraud, undue influence, misrepresentation and are null and void and the Plaintiffs are not bound by such two Sale Deeds and the two Sale Deeds may be set aside;***
- (d) *That an order of permanent injunction may be passed restraining the Defendants from dispossessing the Plaintiffs from their share in the suit property and from transferring the suit property to any third party;*
- (e) *That the cost of the suit may be decreed;*
- (f) *That any other reliefs which the Plaintiff may be found entitled to in law and equity may be decreed.*

20. Apparently, the petitioners asked for a direction upon the plaintiffs (Opposite Party Nos. 1 to 4) to pay ad valorem court

fee in terms of prayer (c) of their plaint. It was the contention of the petitioners that unless such relief is granted, no relief sought vide prayer (a) and (b) could be granted and for that reason prayer (c) should be construed as the main relief and the other reliefs are consequential.

21. Per contra, Opposite Party Nos. 1 to 4/Plaintiffs claimed that they filed the suit for partition of the suit properties held jointly between them and Opposite Party Nos. 5 to 10 (Defendant Nos. 1 to 6). Since, the aforesaid defendants transferred a portion of joint properties without disclosing the same to be so and claiming to be exclusive owners thereof, the deeds so executed were outcome of fraud and misrepresentation of facts. The plaintiffs had vested undivided interest in the suit properties. On such score, the plaintiff asked for a consequential relief of declaration of the deeds standing in the name of petitioners as illegal, and vitiated by fraud, undue influence or misrepresentation and thus null and void.

22. Such determination would be a consequence if the learned trial court comes to a conclusion that there was unity

of title in respect of the suit properties amongst the plaintiffs and the Defendant Nos. 1 to 6 and the said defendants sold out joint properties in favour of the petitioners without a valid partition. It may or may not be in excess of the vested share of the defendant Nos. 1 to 6. In such a situation, Section 52 of the Transfer of Property Act, 1882 may come into play. It would be extremely against the public policy that if a dishonest co sharer goes on selling the joint properties without partition, the other co sharers would every time, be obliged to seek for cancellation of such sale deeds, on payment of ad valorem court fee, before seeking partition of the joint properties.

23. As noted above, the Opposite Party Nos. 1 to 4 filed suit for partition of joint properties as against the other co sharers claiming themselves to be joint owners of the suit properties with Opposite Party Nos. 5 to 10. Since the aforesaid opposite parties had sold certain joint properties in favour of the petitioners, they were also impleaded in the suit. Such facts do not establish that the suit was for cancellation of the deeds in favour of the petitioner and not a partition suit in view of the

reliefs claimed therein. It is trite law that in case of joint properties, possession of one co sharer is possession of all the co sharers. In **Suhrid Singh (Supra)**, it was observed by the Hon'ble Supreme Court that,

“7. 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 17(iii) of the 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.”

24. In the case at hand, no recovery of possession has been sought in the Title Suit. What is sought for is carving out of separate share upon declaration of separate shares of the plaintiffs by appointment of survey knowing partition Commissioner for the purpose.

25. In **Shamsher Singh (Supra)** the Hon’ble Supreme Court noted that,

“As regards the main question that arises for decision it appears to us that while the court-fee payable on a plaint is certainly to be decided on the basis of the allegations and the prayer in the plaint and the question whether the plaintiff’s suit will have to fail for failure to ask for consequential relief is of no concern to the court at that stage, the court in

deciding the question of court-fee should look into the allegations in the plaint to see what is the substantive relief that is asked for.”

26. The case of **Prithvi Raj (Supra)** as well as **Vinayakrao (Supra)** are exactly on the similar point that in a suit asking for a mortgage decree not binding upon the son, the son was obliged to ask for setting aside the decree, as a consequential relief upon payment of ad valorem court fee.

27. The aforesaid decisions were rendered in the context of a declaration for binding nature of a Mortgage decree being not binding sans consequential reliefs. whereas, in the Title Suit under consideration, there appears no failure to ask for consequential reliefs. Separate possession upon declaration of legal share was sought for. There is actually no necessity to ask for cancellation of the deeds and recovery of possession. It would, if at all, required at the time of determination of the shares, recovery of possession may not even be required, if the share of the vendors of petitioners exhausts the properties sold to them, up to their shares held by Defendant Nos .1 to 6. On this score also, the question of paying ad valorem court fee

does not stand. Moreover, the learned trial court also observed in the impugned order that the plaintiff was required to pay ad valorem court fee according to the valuation of each one's share, if declared, for preparation of final decree the time of which is yet to come.

28. Nasiruddin Mallick (Supra) was rendered in a suit for declaration of title coupled with consequential relief for recovery of possession. The facts and circumstances of the present case is altogether different from that which was dealt in **Nasiruddin Mallick (Supra)** and as such, ratio laid down in the said case are not attracted.

29. C. Jankamma (Supra) was delivered in relation to Section 35 of Karnataka Court Fees Act, 1958 with special consideration to averments made in the plaint that the plaintiff was excluded from possession of such property. However, in the present case, nothing is shown that the plaintiffs were excluded from possession of joint properties. It is well settled law that possession of one co owner of joint property is deemed to be possession of all the co owners unless a case of exclusion is made out. No case of exclusion

has been made out by the defendants. The mere fact that the plaintiffs never enjoyed the suit properties at any time is not sufficient to bring a case of exclusion. This finding is not enough for, the mere fact that the plaintiffs were not paid their share of the income or were not in actual physical possession, would not amount to the plaintiffs having been excluded from joint possession to which they are in law entitled.

30. In **Neelavathi (Supra)**, also the Hon'ble Supreme Court noted that,

“7. The trial court has not placed any reliance on the recitals in para 12 of the plaint on which the judgment of the High Court is based. The trial court found on evidence that the plaintiffs never enjoyed the suit properties at any time. This finding is not enough for, the mere fact that the plaintiffs were not paid their share of the income or were not in actual physical possession, would not amount to the plaintiffs having been excluded from joint possession to which they are in law entitled. On a consideration of the plaint as a whole and giving it its natural meaning, we are unable to agree with the conclusion arrived at by the High Court.

31. In the present case, the plaint filed in Title Suit No. 52 of 2017 depicts an unambiguous averment to the effect that the plaintiffs have been possessing the suit properties jointly with Opposite Party Nos. 5 to 10 who are said to have executed false and fabricated deeds in the name of the petitioners. There appears no specific averment, either in plaint or the written statement, that the plaintiffs were excluded from the joint properties.

32. Besides, in **Sri Rathnavaramraja (Supra)** the Hon'ble Supreme Court was of the view that the defendant is not entitled to challenge an order deciding the proper court fee. The Supreme Court observed in following terms:

“3. But this section only enables the defendant to raise a contention as to the proper court fee payable on a plaint and to assist the court in arriving at a just decision on that question. Our attention has not been invited to any provision of the Madras Court Fees Act or any other statute which enables the defendant to move the High Court in revision against the decision of the Court of first instance on the matter of court fee payable in a plaint. The Act, it is true by Section 19, provides that for the purpose of deciding whether the

subject-matter of the suit or other proceeding has been properly valued or whether the fee paid is sufficient, the court may hold such enquiry as it considers proper and issue a commission to any other person directing him to make such local or other investigation as may be necessary and report thereon. The anxiety of the Legislature to collect court fee due from the litigant is manifest from the detailed provisions made in Chapter III of the Act, but those provisions do not arm the defendant with a weapon of technicality to obstruct the progress of the suit by approaching the High Court in revision against an order determining the court fee payable. In our view, the High Court grievously erred in entertaining revision applications on questions of court fee at the instance of the defendant, when no question of jurisdiction was involved.”

- 33.** Similar view was taken in **Kanai Lal Dutta (Supra)** and **Smt. Durga Mudi (Supra)**, coordinate Benches of this court observed that whether proper Fees are paid on a plaint is primarily a question between the plaintiff and the State. The learned Judge in the lower Appellate Court rightly held that the suit has been properly valued and proper Fees have been paid. The defendant, who may believe and even honestly,

the proper Fees have not been paid by the plaintiff, has still no right to move the superior Court against the order adjudging payment of Fees payable on the plaint”.

34. In **Kalipada Kirtan (Supra)** it was laid down by a Division Bench of this Hon’ble Court that,

“11. We find that the learned Trial Judge on consideration of the materials on record rightly concluded that merely because a married sister generally resided in her matrimonial house, for that reason, it could not be said that her title to the property had been extinguished for want of actual possession.

12. It is now settled law that in order to claim adverse possession against the co-sharer, it is necessary to establish the actual ouster of the co-sharer of the property, inasmuch as, in the ordinary course, the possession of one co-sharer should be in law deemed to be the possession of the absent co-sharer. In this connection, we may profitably refer to the following observations of the Apex Court in the case of Darshan Singh v. Gujjar Singh reported in AIR 2002 SC 606 (Para 9):

“In our view, the correct legal position is that possession of a property belonging to several co-sharers by one co-sharer shall be deemed that he possess the property on behalf of the other co-sharers unless there has been a clear ouster by denying the title of other co-sharers and mutation in the revenue record in the name of one co-sharer would not amount to ouster unless there is a clear declaration that title of other co-sharers was denied.”

13. We have found that there is no material evidence showing overt acts on the part of the defendants resulting in ouster of the plaintiff from property. In the record of right, she is still shown to be the co-sharer and consequently, her possession is reflected in the record of right. Although the defendant in his deposition denied that the plaintiff paid her share of rent through him, we are of the opinion that even if no rent was paid by the plaintiff of her share, mere non payment of rent by one co-sharer sister will not amount to ouster the said co-sharer. In this connection, it will not be out of place to refer to the following observations of the Apex Court in the case of *Karbalai Begum v. Md. Sayeed* reported in AIR 1981 SC 77 on the question of non-participation in the rent and profit by a co-sharer: (Para 7)

“It is well settled that mere non-participation in the rent and profits of the land of a co-sharer does not amount to an ouster so as to give title by adverse possession to the other co-sharer in possession. Indeed even if this fact be admitted, then the legal position would be that Mohd. Bashir and Mohd. Rashid, being co-sharers of the plaintiff, would become constructive trustees on behalf of the plaintiff and the right of the plaintiff would be deemed to be protected by the trustees. The learned counsel appearing for the respondent was unable to contest this position of law. In the present case, it is therefore, manifest that the possession of the defendants, apart from being in the nature of constructive trustees, would be in law the possession of the plaintiff.”

- 28.** In the light of discussions made hereinbefore, and in view of the ratio laid down in the case of **Kanai Lal Dutta (Supra)** and **Smt. Durga Mudi (Supra)**, with regard to competence of the petitioners to challenge the impugned order, I find no illegality, material irregularity or impropriety in the impugned order warranting interference.

- 29.** Accordingly, the instant proceeding being C.O. 2319 of 2019 along with all connected applications, if any, is hereby dismissed and thus, disposed of without any order as to costs. Consequently, stay order, if any, shall stand vacated.
- 28.** Urgent photostat certified copy of this order, if applied for, be given to the parties, upon compliance of necessary formalities.

(Md. ShabbarRashidi, J.)