

RAJASTHAN HIGH COURT

Meena

Vs.

Komal Devi

S.B.C.R. No. 247 of 1998

(N.P. Gupta, J.)

12.11.2003

ORDER

N. P. Gupta, J.

1. Heard learned counsel for the parties.
2. By the impugned order, the learned trial Court has held that the suit as framed is covered by Section 35(1) of the Court Fees Act, and therefore, the plaintiff should pay court-fees accordingly. Obviously, if the court-fee is not paid, the suit should be dismissed.
3. The contention of the learned counsel for the petitioner is that on a bare reading of Section 35 as a whole it becomes clear that the present is a suit, which is covered by Section 35(2), and not by Section 35(1).
4. I may reproduce Section 35 as such, which reads as under :

"Section 35 Partition suits.- (1) In a suit for partition and separate possession of a share in joint family who has been excluded from possession of such property, fee shall be computed on the market value of the plaintiffs share of the property.

(2) In a suit for partition and separate possession of joint family property or property owned, jointly or in common, by a plaintiff who is in joint possession of such property, fee shall be paid at the following rates namely :-

(i) Rupees thirty if the value of plaintiff's share is Rs. 5,000/- or less;

(ii) Rupees one hundred if the value is above Rs. 5,000/- but does not exceed Rs. 10,000; and

(iii) Rupees two hundred if such value exceeds Rs. 10,000/-.

(3) Where, in a suit falling under sub-section (1) or sub-section (2) a defendant claim partition and separate possession of his share of the property, fee shall be payable on his written statement computed on half the market value of his share or at half the rates specified in sub-section (2), according as such defendant has been excluded from possession or is in joint possession.

(4) Where, in a suit falling under sub-section (1) or sub-section (2), the plaintiff or the defendant seeks cancellation of decree or other document of the nature specified in Section 38, separate fee shall be payable on the relief of cancellation in the manner specified in that section."

5. A reading of the Section makes it clear, that the precise distinction between the two sub-sections (1) and (2) is that for sub-section (1), the property must be owned jointly, or in common by the plaintiff, and he may have been excluded from possession of such property in which event, the court-fee is payable on the market value of the plaintiff's share. On the other hand, where the suit is for partition and separate possession of the family property, or the property owned jointly, or in common by the plaintiff, who is in joint possession of such property, fee shall be paid at the fixed rates mentioned therein.

6. True it is that, in the present case, the plaintiff has claimed to be joint owner of the property, and has not made a very specific and categorical averment, to the effect of her being in joint possession, but then it is also not averred in the plaint that she has been excluded from possession of such property. In that view of the matter, provisions of which sub-section, is to govern the suit, is a question, which stands answered by Hon'ble the Supreme Court in *Neelavathi v. N. Natarajan*, reported in ¹ where Hon'ble the Supreme Court, dealing with the provisions of Section 37 of the Tamil Nadu Court Fees Act, provisions whereunder were also in pari-materia with the provisions of the Rajasthan Act. Dealing with the question, in para 8, it was held as under:

"The general principle of law is that in the case of co-owners, the possession of one is in a law possession of all, unless ouster or exclusion is proved. To continue to be in joint possession in law, it is not necessary that the plaintiff should be in actual possession of the whole or part of the property. Equally it is not necessary that he should be getting a share or some income from the property. So long as his right to a share and the nature of the property as joint is not disputed the law presumes that he is in joint possession unless he is

excluded from such possession. Before the plaintiffs could be called upon to pay court-fee under Section 37(1) of the Act on the ground that they had been excluded from possession, it is necessary that on a reading of the plaint, there should be a clear and specific averment in the plaint that they had been "excluded" from joint possession to which they are entitled to in law. The averments in the plaint that the plaintiff could not remain in joint possession as he was not given any income from the joint family property would not amount to his exclusion from possession. We are unable to read into the plaint a clear and specific admission that the plaintiff had been excluded from possession."

7. The above proposition of law as laid down by Hon'ble the Supreme Court leaves no manner of doubt that in the situation like the present one, the case has to be governed by Section 35(2) of the Court Fees Act, and not by sub-section (1).

8. Resultantly, the revision petition is allowed. The impugned order is set aside, and the learned trial Court is directed to proceed with the trial of the suit, if the suit is properly valued, and requisite Court fees is paid in accordance with the requirements of Section 35(2). Learned trial Court shall expeditiously proceed with the trial of the suit.

Revision allowed.

Cases Referred.

1. AIR 1980 SC 691