

Lakhan Singh vs Sultan Singh And Ors. on 11 January, 1951

Equivalent citations: AIR1951ALL571, AIR 1951 ALLAHABAD 571

JUDGMENT

Agarwala, J.

1. This is an appeal by the pltf under Section 6A, Court-fees Act.

2. The pltf & the defts are members of one family. The pltf claimed that he & the defts were co-sharers in the suit properties which include properties situated in village Jalkhera & those situated in village Hartoli besides other villages. The relief claimed by him was for partition of his share which he alleged was 3/4th. He paid court-fee on 1/4th of the value of his share in the properties. The defence to the suit was that the pltf had exchanged his share in the Jalkhera properties for the deft's share in the Hartoli properties & that, therefore, the pltf was not entitled to any share out of the Jalkhera properties. It was further pleaded that the pltf was out of possession of the Jalkhera properties & the court-fee paid by him was, therefore, deficient. The lower Ct held that the pltf was not in actual possession of the Jalkhera properties since 1920, that the defts had been in exclusive possession thereof, that the defts had denied the pltf's claim to be a co-sharer in those properties & that, therefore, he was liable to pay court-fee under the second clause of Section 7(vi A), that is to say, on the full value of his share in the properties & not merely on 1/4th value of his share. From this order the pltf has come up in appeal to this Ct.

3. Section 7(vi-A) of the Court-fees Act which has been introduced by the U. P. Legislature runs as follows: The amount of fee payable under this Act shall be computed:

"In suits for partition -- According to one-quarter of the value of the pltf's share of the property, & according to the full, value of such share if on the date of presenting the plaint the pltf is out of possession of the property of which he claims to be a coparcener or co-owner and his claim to be a coparcener or co-owner on such date is denied."

4. There are two portions of this section: (1) when the court-fee has to be paid on 1/4th of the value of the pltf's share of the property claimed; & (2) when court-fee has to be paid on the full value of the pltf's share in those properties. The second part of the section on which the Ct below has relied applies only when two conditions are fulfilled, (a) The pltf is 'out of possession' of the property of which he claims to be a coparcener or co-owner, & (b) his claim to be a coparcener or co-owner on the date of the plaint is denied by the defts. We may presume, in the present case, that the pltf's claim to be a coparcener or a co-owner on the date of the presentation of the plaint has been denied by the defts. The question is whether the pltf has been proved to be 'out of possession' of the properties in suit.

5. Now the pltf claims to be a co-sharer in the properties in suit. For purposes of determining the question of court-fee payable, this claim has to be accepted. It is admitted that he is in possession of the Hartoli properties. The pltf is, therefore, in possession of a portion of the properties alleged to be jointly owned by the parties. If he is in possession of a part of the joint properties then unless he has been ousted from the rest of the properties, or has, in some other way, lost his title thereto, e.g. by previous partition, exchange etc., he must be deemed to be in possession of all the joint properties for the simple reason that the possession of the other co-sharers over those properties will be construed as being not only on behalf of himself but also on behalf of all other co-sharers. As was laid down in 'Sahjan Bibi v. Asanulla', 54 Cal 524: (A I R (14) 1927 Cal 411), "Whether a pltf in a suit for partition has such possession or not is to be determined in view of the principle that the possession of one co-owner is 'prima facie' the possession of all the co-owners & his possession must be presumed to be in conformity with his right & title as co-owners. If it is established that he is not in possession at all or any portion of the joint property & that there has been a complete ouster, he must sue for recovery of possession & partition & pay 'ad valorem' court-fees upon a plaint appropriately framed for that purpose. This follows from the principle that partition signifies the transformation of joint possession into separate possession. If, however, the possession of the pltf is admitted or established over what forms part of the joint estate, the suit does not cease to be one for partition, merely because the deft denies the title of the pltf to a share of the estate or to specific lands of the estate & asserts a hostile title & adverse possession therein."

This statement of the law was followed with reference to the interpretation of Section 7(vi A), Court-fees Act by a learned Judge of the late Oudh Chief Ct, vide 'Syed Safdar Husain v. Mst. Achcham Begam', AIR (30) 1943 Oudh 456: (209 I C 442), in which it was held, "The word 'possession' in Section 7(vi-A) is not restricted to actual possession & includes constructive possession. If in a case of joint property a co-owner brings a suit for partition of a share & is able to show that he is in actual possession of a portion of the joint property, a presumption of constructive possession in respect of the property of which he is not in actual occupation arises, & the pltf cannot be said to be out of possession of the property of which he claims to be co-owner. Such a suit, therefore, is governed by the first portion of Section 7(vi-A) & court-fee is payable on one quarter of the value of the pltf's share of the joint property."

With this view of the law, we are in entire agreement.

6. The pltf will be out of possession of the property of which he claims to be a co-owner or coparcener only if the deft is not only in actual possession thereof, but also has ousted the pltf from its possession, in other words, has denied prior to the institution of the suit, the pltf's title thereto, or has proved some other act by which the pltf may be said to have been dispossessed or lost possession over the same. Unless dispossession of the pltf from the disputed property is shown the pltf will be presumed to be in constructive possession thereof & his case will fall under the first part of Section 7(vi-A) & not under the second part.

7. In the present case, though there is a finding that the pltf has not been in actual possession over the Jalkhera properties, there is no finding that the defts had before the institution of the suit denied the pltf's title to those properties. The defts no doubt denied the pltf's title in the written statement &

they denied that on the date of the institution of the suit the pltf had any title to the Jalkhera properties, but there is no proof that this denial ever took place prior to the institution of the suit. A denial in the written statement that the pltf had any title on the date of the suit fulfils the second requirements of the second portion of Section 7(vi-A) but does not fulfil the first requirement which can be fulfilled only on proof of denial of the pltf's title at some period before the institution of the suit & by proof of actual possession of the defts from before the institution of the suit. In our opinion, constructive possession is also possession & the pltf cannot be said to be out of possession unless even the constructive possession has been negated by proof of ouster or denial of title anterior to the suit. In the circumstances, it could not be said that the pltf was out of possession of the Jalkhera property or was not in constructive possession thereof. This being so, the court-fee paid by the pltf was sufficient.

8. We, therefore, set aside the order of the Ct below & direct that it shall proceed to dispose of the suit according to law.