(1940) 09 AHC CK 0018

Allahabad High Court

Case No: None

Mt. Muniran	APPELLANT
Vs	
Mt. Mukhtar Begam and Another	RESPONDENT

Date of Decision: Sept. 5, 1940

Acts Referred:

- Court Fees Act, 1870 - Section 17(vi)

Citation: AIR 1940 All 521 : (1940) 10 AWR 536

Hon'ble Judges: Braund, J

Bench: Division Bench

Final Decision: Disposed Of

Judgement

Braund, J.

This is a second appeal in which a short point is involved. The suit is a partition suit. The plaintiff, Mt. Mukhtar Begam, is the daughter of Shamsher Khan and his wife, the defendant-appellant, Mt. Muniran. A court-fee of Rs. 15 has been paid in respect of the appeal under Article 17(vi), Court-fees Act, 1870. The short point I have to determine is whether that is the correct court-fee. The defence to the suit by the defendant-appellant Mt. Muniran, is that her husband, Shamsher, long since died and she, as his widow, has since his death been, and still is, in possession of the property in question in lieu of dower. She says that her dower amounted to Rs. 5000-which is not disputed-and she pleads her present possession as "possession in lieu of dower," setting it up in priority to the plaintiff"s right of partition.

2. There is no question but that, if the widow lawfully and without force or fraud obtained possession of the premises in lieu of dower, her possession will be paramount to the right of partition of the heirs. The substantive question therefore to be determined in the suit was whether the admitted present possession of the widow qualifies as "possession in lieu of dower." The Munsif before whom the suit was first heard came to the conclusion, as a fact, first that the defendant was not in

possession in lieu of dower, second that a certain nashishtgah in dispute did not form part of the house, and thirdly, that the suit was not under-valued. Thereupon, the defendant appealed and by her memorandum of appeal dated 14th May 1938 no question is raised as to the sufficiency of the court-fee paid upon the original plaint. But this memorandum of appeal was itself valued at Rs. 200 and a court-fee of Rs. 15 only was paid in respect of it. It is the sufficiency of this court-fee with which I have now to deal. The munsarim attached to the Court of the District Judge expressed a considered view that this court-fee was insufficient. The same view found favour with the learned District Judge who rejected the memorandum of appeal on the ground of the insufficiency of the court-fee paid. The view taken by the munsarim and, presumably, by the District Judge is that the appellant is, in effect, seeking in the appeal to establish either a ''charge'' on the property in respect of her dower, or in the alternative, a condition-namely, the redemption of her dower debt-precedent to the plaintiff''s right to get partition, and it is said that for these reasons the appeal ought to have been valued on the amount, or on the outstanding amount, of the dower debt and an ad valorem court-fee paid accordingly.

3. I think that no question of any ''charge'' on the property strictly speaking arises. The right of a Mahomedan widow who is in possession of the property of her deceased husband to retain possession until her dower is satisfied does not, I think, constitute in a legal sense a charge on the property. It is rather in the nature of a possessory lien on the property-a mere right in certain circumstances to remain in possession until the dower debt is satisfied out of the rents and profits. Nor do I think that when a Mahomedan widow in the same circumstances says, in defence to the claim of the heirs for possession, that she is entitled to remain in possession as doweress, that amounts to a claim to ''enforce'' a charge or condition precedent-at least in any positive sense. All she is saying is that she is in possession and is entitled to remain there until redemption of her dower debt. She is not asking for any decree or order that the plaintiff should pay her dower to her and, indeed, I doubt if she would have any right to do so. Her attitude, as it seems to me, is a purely defensive one-that the plaintiff is not entitled to possession as against her. It is true, no doubt, that, if the plaintiff were to say, that he would pay her the dower due to her, she would probably be only too pleased to accept it and would thereupon relinquish possession. She would probably be bound to. But that is not the same thing as saying that the right she is endeavouring to enforce in her appeal is a right to have her dower debt redeemed by the plaintiff. There are, however, a number of authorities bearing on this question which have been discussed by the munsarim. In Basdeo Ran v. Sri Krishn Gir (10) 13 OC 62 the position was that a plaintiff who sought possession of property obtained a decree conditionally upon his paying off a mortgage for Rupees 10,000 secured upon it. He appealed alleging that he was entitled to possession without paying that sum and it was decided that the court-fee on the appeal had to be assessed ad valorem on the sum of Rs. 10,000. Now, what

the appellant was seeking to do in that appeal was to discharge himself altogether from a burden of Rs. 10,000, in other words, to put Rs. 10,000 into his own pocket, and I can well understand the principle upon which in that case he was charged with an ad valorem court-fee on Rs. 10,000. As was said by the Assistant Judicial Commissioner in that case:

Although it may be said that one object of the appellant is to get possession of certain property, his main object is to avoid payment of a certain sum....

4. It seems to me that this is quite different from the present case. In our case there is no dispute that the widow is entitled to dower. Nor is it disputed what the amount is. She is not seeking to get anything more than she is already entitled to. All she is doing is, by way of defence to the plaintiff''s claim, to say that, for the present, her right to possession is paramount to that of the plaintiff. The next of these authorities in order of date is Moti Begam v. Har Prasad (18) 5 AIR 1918 All 79. Here the plaintiff was a mortgagee who was seeking to enforce his mortgage. The defendant set up, in priority to the mortgage, a decree for dower for which the mortgage property had expressly been made security and in the original Court her claim to priority was disallowed. She appealed. This again to my mind is quite a different case from ours. She was not seeking there merely to defend her subsisting possession of the property as doweress. She was seeking affirmatively to establish against property, of which she was not in possession in lieu of dower, a security in the nature of a specific charge. She was, in short, endeavouring to enforce a right affirmatively and not merely to defend one she already had. As is said in that case:

...The appellant is not only trying to get rid of the liability imposed on her by the decree but to impose a further liability on the property, and as such the appellant must pay ad valorem court-fee on the further charge thus imposed....

5. In Kishun Dutt v. Kasi Pandey (20) 7 AIR 1920 Pat 222 there was a suit for possession in which a decree was passed conditionally upon the plaintiff paying off certain encumbrances. The plaintiff appealed and he was required to pay a court-fee ad valorem on the amount of the encumbrances he was endeavouring to relieve himself of. This is the same type of case as Basdeo Ran v. Sri Krishn Gir (10) 13 OC 62. Here again, it is obvious, that the real dispute was whether the plaintiff was liable to pay the sum in question or not. If he was right in his appeal he would be so many rupees better off. As the learned Judge says "...the subject-matter of this appeal is the encumbrances...." In the appeal before me, if the appellant succeeds, she is entitled to not one anna more than she was before. All that will have happened is that she will have successfully resisted ejectment. Of the same type are the cases in Wadhawa Singh v. Sundar Singh (21) 8 AIR 1921 Lah 371 and Lakhram v. Ramjidas (20) 7 AIR 1920 Lah 92, both decided in the Lahore High Court. Those again are cases in which the objects of the appeals were to avoid the payment of money altogether, and so to enrich the appellant.

6. In my view the fundamental error into which the munsarim has fallen is that he has regarded this appeal as a proceeding having for its object the "enforcement" of what he describes as a "condition precedent." It is not. If the appellant had by her appeal endeavoured to obtain a decree against the plaintiff that he should pay her Rs. 5000 or had she even endeavoured to obtain a decree establishing her right to Rs. 5000, then I think she would have come within that class of case, to which I have referred above. But, in this case, no one has suggested that she is not entitled to dower. Nothing she asks for in this appeal will give her more by way of dower than she is already entitled to. The only result of the appeal may be that she will not have to deliver up possession of certain property to the plaintiff. I think that the true test, in all such oases as these, must be to consider what would be the position if the appellant was endeavouring to establish in a suit in which she was plaintiff the same right as she is trying to maintain in the appeal. Applying that test in this case, the appellant would, I do not doubt, frame her plaint by asking for a declaration that in the events which have happened she is entitled to remain in possession of the property in question until, out of the rents and profits thereof, her admitted dower debt is satisfied. That would be a suit for a declaration purely and simply. No prayer for consequential relief would be necessary or possible. There is no dispute as to the amount of her dower. She is already in possession of the property. What more can she ask for or get than a declaration of her right to stay there? And in that case the court-fee would not be an ad valorem court-fee.

7. For all these reasons, I feel obliged to allow this appeal and to set aside the order of the learned District Judge rejecting the appeal to his Court. The proceedings will be returned to the Court of the District Judge of Meerut for the appeal now to be heard on its merits. The respondents must pay the appellant''s costs of this appeal in any event. I do not think that this is a case which I should certify as fit for a Letters Patent appeal.