## APPELLATE CIVIL—FULL BENCH.

*Before Sir John Wallis, Kt., the Officiating Chief Justice, Mr. Justice Seshagiri Ayyar and Mr. Justice Kumaraswami Sastriyar.*

1914. September, 1 and 16 and October, 5 and 14.

ARUNACHALAM CHETTY AND ANOTHER (PLAINTIFFS), APPELLANTS,

*v.*

RANGASAWMY PILLAI (DEFENDANT), RESPONDENT.*

*Declaration and injunction, suit for—Whether a suit for declaratory decree with consequential relief—Court fee payable, whether* ad valorem—*Court Fees Act (VII of 1870), sec. 7, cl. 4 (c).*

A suit for a declaration that a mortgage-decree is not binding on the plaintiff and for an injunction restraining the defendant from executing the same is a suit for a declaratory decree with consequential relief within the meaning of section 7, clause 4 (c), of the Court Fees Act and an *ad valorem* fee is payable on the valuation fixed in the plaint.

SECOND APPEAL against the decree of E. L. THORNTON, the District Judge of Trichinopoly, in Appeal No. 297 of 1912, preferred against the decree of T. JIVAJI RAO, the District Munsif of Srirangam, in Original Suit No. 264 of 1910.

The facts are set out in the order of reference to the Full Bench.

*V. Viswanatha Sastriyar* for the appellants.

*T. V. Muthukrishna Ayyar* for the respondent.

This Second Appeal came on for hearing before SANKARAN NAIR and AYLING, JJ., who made the following

ORDER OF REFERENCE TO A FULL BENCH.

SANKARAN NAIR AND AYLING, JJ.

The question for decision in this Second Appeal is whether the plaintiffs are bound to pay *ad valorem* Court fee on their plaint

The allegations in the plaint are that their father executed a hypothecation bond on which a suit was brought by the creditor against the father as first defendant in that suit and the present plaintiffs as defendants Nos. 2 and 3, that these plaintiffs were really minors at that time, though they were not

* Second Appeal No. 696 of 1913.

described as such in the plaint, and that a decree was passed both against the plaintiffs' father as well as against the plaintiffs. They now allege that the debt is not binding on the family and that the decree itself is a nullity. They, therefore, seek for a declaration to that effect and for an injunction to restrain the defendant from executing the decree. The lower Courts were of opinion that *ad valorem* Court fee should be paid. The contention in Second Appeal is that the suit is only for a declaratory decree and if the prayer for injunction is regarded as a consequential relief, then they are entitled to value it as they like and that the lower Courts were not right therefore in holding that the Court fee must be paid on the amount of the decree which is sought to be declared not binding on the plaintiffs.

The earliest case decided by the Madras High Court is *Naraina Putter* v. *Aya Putter*(1). In that case, the plaintiff had executed a document whereby he created a charge of Rs. 4,500 on certain immoveable property and the suit was brought to cancel the document. The question for decision was whether the suit should be valued for purposes of jurisdiction upon the sum secured by the document sought to be cancelled and whether institution fee should be paid on that sum. The first Court held in that case that the plaintiff merely sought for a declaration without any consequential relief and that therefore Rs. 10 was the proper institution fee. The High Court held that as the plaintiff in that suit had executed a document of legal validity, it created a charge of [the amount of Rs. 4,500 that the cancellation of that document was a relief of a very substantial description and very far from being a mere declaration. It was a suit in their opinion really to get rid of a charge and for the removal of a burden legally created. In *Tacoordeen Tewarry* v. *Nawab Syed Ali Hossein Khan*(2) their Lordships of the Privy Council held that a prayer for setting aside a deed is a prayer for substantial relief, taking apparently the same view as was subsequently taken by the Madras High Court. To the same effect is a decision in *Parathayi* v. *Sankumani*(3). In *Samiya Mavali* v. *Minammal*(4) their Lordships cited apparently with approval those two decisions. At any rate no dissent was expressed from them. The latest case in the Indian

(1) (1874) 7 M.H.C.R., 372 at p. 374. (2) (1874) 21 W.R., 340.
(3) (1892) I.L.R., 15 Mad., 294. (4) (1900) I.L.R., 23 Mad., 490.

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Law Reports that has been cited to us is *Chinnammal* v. *Madarsa Rowther*(1). The plaint in that suit for the cancellation and delivery of a mortgage-deed for Rs. 4,000 executed by the plaintiff to the defendant was valued by the plaintiff at Rs. 50. The learned Judges, Messrs. BODDAM and BASHYAM AYYANGAR, JJ., held that the valuation given by the plaintiff must be accepted. This decision seems to us to be entirely opposed to those in *Naraina Putter* v. *Aya Putter*(2) and *Parathayi* v. *Sankumani*(3). In a later case, *Achammal* v. *Achammal*(4) a different view was taken. The suit was brought by 25 plaintiffs, 2 to 24 of whom were parties to a sale-deed regarding which a declaration of invalidity was sought. The learned Judges held that, so far as these plaintiffs who were parties to the deed were concerned, if a declaration were given, the result would be the same as if the deed were cancelled and therefore *ad valorem* stamp fee must be paid by them.

The decisions, therefore, appear to be in direct conflict with one another. The decisions in *Naraina Putter* v. *Aya Putter*(2) *Parathayi* v. *Sankumani*(3) and *Achammal* v. *Achammal* (4), hold that where there is a liability which is sought to be got rid of, then *ad valorem* fee must be paid. The decision in 27 Madras certainly and possibly *Samiya Mavali* v. *Minammal*(5) are in conflict with them. Where a party executes a document, or a decree is passed against him, *primâ facie* such deed or decree is binding on him. Until it is set aside it cannot be treated as void. The decree, therefore, declaring that the deed or decree is not binding on the plaintiff has the effect of the cancellation of the deed or decree. It does not appear to us to be a mere declaratory decree. The case might be different where a declaration is sought by a person who is not a party to the bond or the decree. In a case like that, the suit may properly be regarded as one for declaration but in the other case, it is more properly a suit to get rid of an already existing obligation.

We think that in this state of authorities, as the question is one of procedure and great practical importance, it is desirable to have a final decision. We therefore refer to a Full Bench the question

(1) (1904) I.L.R., 27 Mad., 480. (2) (1874) 7 M.H.C.R., 372 at p. 374.
(3) (1892) I.L.R., 15 Mad., 294. (4) (1910) 20 M.L.J., 791.
(5) (1900) I.L.R., 23 Mad., 490.

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(1) Whether a suit for a declaration that an instrument of mortgage or sale executed by the plaintiff or a decree that has been passed against the plaintiff for a debt is not binding on him, is a declaratory suit only or

(2) Whether it is a suit with consequential relief falling under section 7, paragraph 4 (*c*) of the Court Fees Act under which the Court is bound to accept such valuation as may be fixed by the plaintiff or

(3) Whether it is a suit in which the plaint must be valued according to the mortgage or the decree amount.

This REFERENCE coming on for hearing before the Full Bench, the Court expressed the following

OPINION.

WALLIS, OFFG. C.J., SESHAGIRI AYYAR AND KUMARASWAMI SASTRIYAR, JJ.

A suit in which the plaintiff in terms prays for a declaratory decree and consequential relief *primâ facie* comes within clause 4, sub-clause (*c*) of section 7 of the Court Fees Act, but if at the same time it comes within any of the other classes of suits specified in the section, it must be treated as a suit of that description and dealt with accordingly. A suit such as the present for a declaratory decree that a decree passed against the plaintiff is not binding on him and for an injunction restraining the decree-holders from executing it against him cannot be brought within any other part of the section except clause 4, sub-clause (*c*). So too the other class of suits included in the reference, viz., suits to declare a mortgage or sale-deed not binding on the party executing it, cannot be brought within clause 8 or any other part of the section except clause 4, sub-clause (*c*). As the present suit for a declaration and an injunction comes within clause 4 (*c*), the plaintiff is required by the section to state the amount at which he values the relief sought by him in the plaint, which he has to verify, and the *ad valorem fee* payable in respect of the suit is to be computed accordingly. A Full Bench of this Court has recently held, in a judgment in *Ramiah* v. *Ramaswami*(1), to which one of the referring Judges was a party, that the valuation given by the plaintiff in cases coming under clause 4 is conclusive, and we do not think it was intended to raise that question again in the present reference, nor are we prepared to reopen it.

(1) (1913) 24 M.L.J., 233. (F.B.)

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We have now dealt with the present case of a prayer for a declaratory decree and consequential relief as well, but the terms of the reference include also the case where a declaratory decree of the nature indicated is asked for without any consequential relief. In *Tacoordeen Tewarry* v. *Nawab Syed Ali Hossein Khan*(1), such a suit was held not to be a suit for a mere declaration but for substantive relief. In *Naraina Putter* v. *Aya Putter*(2), a suit for the cancellation of a document obtained from the plaintiff by fraud was held not to be a suit for a mere declaration but also for consequential relief. In *Karam Khan* v. *Daryai Singh*(3), it was held in view of the provisions of section 39 of the Specific Relief Act, that such a suit was a mere declaratory suit and did not involve consequential relief. This was not followed in *Parathayi* v. *Sankumani*(4), and was expressly dissented from in *Samiya Mavali* v. *Minammal*(5), as also in *Kalabhai* v. *The Secretary of State for India*(6). In *Chinnammal* v. *Madarsa Rowther*(7), the case mentioned in the reference was a suit for the cancellation and delivery up of a bond, and was held, we think rightly, to be a suit for a declaratory decree with consequential relief under clause 4 (*c*). In *Chingacham Vitil Sankaran Nair* v. *Chingacham Vitil Gopala Menon*(8), the point was again expressly considered and it was held that the substance and not the language of the plaint must be looked to; and though the suit in question was held to be a merely declaratory suit not involving consequential relief, the Court at the same time expressed the opinion that where it was incumbent on the plaintiff to get the document set aside before he could question it, it must be treated as involving a prayer for consequential relief and the provisions of clause 4 (*c*) would be applicable. This was followed in *Achammal* v. *Achammal*(9), where it was held that though only a declaration was asked for, the suit was one for cancellation and that clause 4 (*c*) applied. The statement in the judgment that an *ad valorem* fee was payable does not mean that clause 4 (*c*) was not applicable, because the fee payable in suits falling under this

(1) (1874) 21 W.R., 340.
(2) (1874) 7 M.H.C.R., 372.
(3) (1885) I.L.R., 5 All., 331.
(4) (1892) I.L.R., 15 Mad., 294.
(5) (1900) I.L.R., 23 Mad., 490.
(6) (1905) I.L.R., 29 Bom., 19.
(7) (1904) I.L.R., 27 Mad., 480.
(8) (1907) I.L.R., 30 Mad., 18.
(9) (1910) 20 M.L.J., 791.

clause is *ad valorem*, though under the provisions of the section it is computed according to the amount at which the relief sought is valued in the plaint. The most recent decision in *Harihar Prasad Singh* v. *Shyam Lal Singh*(1), is to the same effect. Following these authorities, we are of opinion that a suit of the nature indicated in the reference which merely asks for a declaration is none the less a suit for a declaratory decree with consequential relief within the meaning of clause 4 (*c*).

ARUNACHALAM CHETTY v. RANGASAWMY PILLAI.

WALLIS, OFFG. C.J., SESHAGIRI AYYAR AND KUMARASWAMI SASTRIYAR, JJ.

This Second Appeal came on for final disposal before SANKARAN NAIR and AYLING, JJ., who delivered the following

JUDGMENT.—In accordance with the Opinion of the Full Bench, we reverse the decrees of the Courts below and direct the District Munsif to restore the suit to his file and dispose of it according to law. Costs will abide the result.

SANKARAN NAIR, AND AYLING, JJ.

S.V.

## APPELLATE CIVIL—FULL BENCH.

*Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Ayling and Mr. Justice Sadasiva Ayyar.*

SUBRAMANIA AYYAR (PLAINTIFF), APPELLANT,

*v.*

BALASUBRAMANIA AYYAR AND OTHERS (DEFENDANTS NOS. 1 AND 2 THE LEGAL REPRESENTATIVES OF THE DECEASED FIRST DEFENDANT), RESPONDENTS. *

1913, April 11 and 16. 1915, March 1 and 2 and April 1.

*Transfer of Property Act (IV of 1882) ss. 61, 85 and 99—Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 1 and 14—Mortgagee holding two mortgages—Suit on the second mortgage subject to his interest in a prior mortgage—Maintainability.*

It is open to a mortgagee to bring a suit for the recovery of his debt by sale of the properties mortgaged to him subject to his interest in a prior mortgage.

SECOND APPEAL against the decree of F. D. P. OLDFIELD, the District Judge of Tinnevelly, in Appeal No. 584 of 1911, preferred against the decree of S. SUBBAYYA SASTRI, the District Munsif of Tinnevelly, in Original Suit No. 60 of 1909.

(1) (1913) I.L.R., 40 Calc., 615.

* Second Appeal No. 734 of 1912.