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ABDULAKHI v. SADA NAND.

In view of the considerations which we have set forth we are of opinion that there is no right to apply for review of the judgment of a Bench of this Court made in Letters Patent appeal, and we accordingly return an answer to that effect.

BY THE COURT.—The answer of the majority of the Judges composing the Full Bench to the question, whether an application for review of judgment lies where an appeal has been decided under the Letters Patent, is that no such application for review of judgment lies.

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice King.

1931 January, 19.

RADHA KRISHNA (PLAINTIFF) *v.* RAM NARAIN AND OTHERS (DEFENDANTS).*

Court Fees Act (VII of 1870), section 7 (iv) (c), schedule II, article 17(iii)—Suit for declaration—Declaration that compromise decree not binding on plaintiff—Consequential relief not expressly asked for—Court fee payable.

A suit in which the only prayer is for a mere declaration that a certain compromise decree is void and ineffectual as against the plaintiff is a suit to obtain a declaratory decree where no consequential relief is prayed, and the proper court fee payable is one of Rs. 10 under article 17(iii) of schedule II of the Court Fees Act.

The question of court fee must be decided on the plaint and the relief actually asked for therein, and the decision is not affected by the question whether the suit is maintainable under section 42 of the Specific Relief Act, or whether the plaintiff should have asked for a consequential relief such as an injunction restraining the decree-holder from executing the decree, or whether the plaintiff has applied for stay of execution, or whether a mere declaration if granted will serve any useful purpose. Fiscal statutes must be strictly construed. When the plaintiff has carefully refrained from

*First Appeal No. 429 of 1929, from a decree of Raja Ram, First Subordinate Judge of Cawnpore, dated the 23rd of October, 1929.

asking for consequential relief, it is not for the court to consider that he should nevertheless be deemed to have asked for consequential relief.

Messrs. *A. Sanyal* and *S. B. Johari*, for the appellant.

Messrs. *Iqbal Ahmad*, *Gopi Nath Kunzru* and *Mansur Alam*, for the respondents.

BANERJI and KING, JJ. :—The suit which gives rise to this appeal was instituted for setting aside a compromise and a decree for money passed on the basis of the compromise.

The plaintiff is a minor. Defendants Nos. 2 to 4 are his brothers. After their father's death defendant No. 2, Gauri Shankar, executed promissory notes for Rs. 75,000 in favour of Ram Narain, defendant No. 1. Mst. Janki Kuar (defendant No. 5) and her three sons Manni Lal (defendant No. 3), Kanhai Lal (defendant No. 4) and Radha Krishna (plaintiff) sued Gauri Shankar (defendant No. 2) for partition of the joint family property. While the suit was pending, Ram Narain (defendant No. 1) brought a suit, No. 53 of 1928, against Gauri Shankar and his three brothers on the basis of the promissory notes. Both the suits were decided according to a compromise filed on the 8th of August, 1928. Ram Narain's suit was decreed in full against Mst. Janki Kuar and her three sons. Gauri Shankar surrendered his share in the family property in return for being absolved from liability in respect of Ram Narain's claim.

The plaintiff instituted the present suit for cancellation of the compromise and the decree passed upon its basis, alleging that he was a minor and his interests were not protected by any validly appointed guardian *ad litem*, and that he is not bound by the compromise and decree which were obtained by fraud. He paid a court fee of Rs. 10 only, as for a simple declaratory

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suit, although the suit was valued at Rs. 70,350 for the purpose of jurisdiction. Objection was made that the court fee should be paid *ad valorem* on Rs. 70,350. The plaintiff then applied to amend his plaint so that the prayer for relief should read as follows :—"It may be declared that the petition of compromise dated the 8th of August, 1928 and the decree passed upon its basis in suit No. 53 of 1928 are ineffectual and null and void as against the plaintiff, and that the plaintiff is not bound thereby". The court passed an order on the 5th of September, 1929, that the plaint be amended accordingly. We have, therefore, to consider the court fee payable on the plaint in its amended form.

The trial court held that the suit was in substance a suit to set aside the compromise and decree and that the plaintiff must pay an *ad valorem* court fee on the money value of the decree which he sought to set aside. As the plaintiff failed to make good the deficiency of court fee the trial court rejected the plaint under order VII, rule 11(*c*) of the Code of Civil Procedure. Hence this appeal.

The question for decision is whether the suit should be held to be a suit "to obtain a declaratory decree where no consequential relief is prayed", within the meaning of schedule II, article 17 (iii); or a suit "to obtain a declaratory decree or order, where consequential relief is prayed", within the meaning of section 7(iv)(*c*). No other provision of the Court Fees Act has been suggested as being applicable to this suit.

Prima facie the suit is to obtain a mere declaratory decree. No consequential relief, such as an injunction restraining Ram Narain from executing his decree against the plaintiff, is prayed for. The question seems to be whether the plaintiff should be *deemed* to

have prayed for consequential relief although he has not expressly done so.

The rulings on this point are unfortunately conflicting. Each side can support his contention with judicial authority. The following rulings are cited by the plaintiff appellant:—

Karam Khan v. *Daryai Singh* (1). This is a Full Bench decision. The suit was for cancellation of a mortgage deed. The order of reference suggested that the suit was of the kind mentioned in section 39 of the Specific Relief Act and was in the nature of a simple declaratory suit. Five learned Judges concurred in that view, without giving any reasons. This omission is unfortunate, as a decree for the cancellation of an instrument might well be held to be more than a simple declaratory decree, and a suit under section 39 is not a suit under chapter VI which deals with declaratory decrees. We should be bound by the ruling, if it were directly applicable to the facts of this case, but in our opinion it can clearly be distinguished. In the present suit a declaration of the invalidity of the petition of compromise can hardly be regarded as a separate relief, because the compromise is embodied in the decree. We consider therefore that the suit should be treated, for the purpose of the court fee, as a suit for a declaration that the decree is not binding upon the plaintiff. A decree is not an "instrument" within the meaning of section 39 and the suit cannot be held to be a suit under section 39. The ruling, therefore, only helps the plaintiff indirectly, in so far as the cancellation of an instrument can be considered analogous to a declaration that a decree is not binding upon the plaintiff. No decision of this Court has been cited which is directly in point.

Shrimant Sagajirao v. *Smith* (2) is a clear authority in the plaintiff's favour. It was held that a suit

(1) (1883) I.L.R., 5 All., 331. (2) (1895) I.L.R., 20 Bom., 736.

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in which the only prayer is for a declaration that a decree was null and void is a suit for a declaratory decree without consequential relief and article 17(iii) is applicable. This case is on all fours with the case before us. This ruling was followed by the Calcutta High Court in *Zinnatunnessa Khatun* v. *Girindra Nath Mukerjee* (1), which is also directly in point. MACLEAN, C. J., remarked: "The safest course in these cases is to ascertain what the plaintiff actually asks for by his plaint, and not to speculate upon what may be the ulterior effect of his success".

Bagala Sundari Debi v. *Prosanna Nath Mookerjee* (2) follows the above ruling and also clearly supports the plaintiff's contention. It may be noted that in that case the prayer was not merely for a declaration that a certain decree passed against the plaintiff was not binding upon him, but also for setting aside the decree. In that respect it goes beyond the present case where the prayer is for a declaration only and not for "setting aside" the decree as against the plaintiff.

A similar view was taken in *Sri Gokul Nath Jiu* v. *New Birbhum Coal Company* (3). The court observed that it was not within the province of the Taxing Officer "to see whether the suit is properly framed, whether the plaintiff is entitled to the declaration asked for, or what would be the effect if the plaintiff succeeds in obtaining a declaration as prayed for".

Tikait Thakur Narayan Singh v. *Nawab Saiyid Dildar Ali* (4) also supports the plaintiff's contention. The plaintiff had prayed for a mere declaration of title. An objection was raised that he should have paid a court fee as in a suit for declaration of title and for possession. The court observed: "The question of court fee must be decided on the plaint; and though it

(1) (1903) I.L.R., 30 Cal., 788, 790.
(2) (1916) 35 Indian Cases, 797.
(3) A.I.R., 1924 Cal., 183.
(4) (1924) I.L.R., 3 Pat., 915 (928).

is open to the court to say that the plaintiff has really asked for a consequential relief though he has tried to conceal it by casting the reliefs in a particular form, it is not open to the Court to say that the plaintiff should have asked for a consequential relief, and should have paid the proper fee as in such a suit. Here the plaintiff insists that it is not necessary for him to ask for a consequential relief. Although he takes a risk in so insisting, in that he is liable to have his suit dismissed under section 42 of the Specific Relief Act if the Court ultimately comes to the conclusion that it was open to him to ask for a consequential relief, he is clearly entitled to have the case made by him in the plaint tried by the courts." We concur in this view.

Now we have to consider the authorities cited by the defendant respondent. The weightiest authority is a Full Bench decision of the Madras High Court in *Arunachalam Chetty* v. *Rangasawmy Pillai* (1). The suit was for a declaration that a mortgage decree was not binding on the plaintiff and for an injunction restraining the defendant from executing the same. It was held that the suit was for a declaratory decree with consequential relief, within the meaning of section 7, clause (iv)(*c*), of the Court Fees Act. Upon the facts of that case the correctness of the decision cannot be doubted, as there was a prayer for an injunction which is clearly a prayer for a consequential relief. The present case is distinguishable upon the facts, as there is no prayer for an injunction or for any other form of consequential relief. The terms of the reference to the Full Bench, however, raised a question which was unnecessary for the decision of the case, namely: "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

(1) (1914) I.L.R., 38 Mad., 922.

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plaintiff for a debt is not binding on him, is a declaratory suit only". Their Lordships after reviewing the authorities held 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 (iv) (*c*). Although this opinion is entitled to great weight, it must be regarded as an *obiter dictum*. From the point of view of the fiscal authorities this decision seems unimportant, as their Lordships also held that the plaintiff was entitled to put his own valuation on the relief claimed, and such valuation was conclusive.

Parvatibai v. *Vishvanath Ganesh* (1) was a suit for a declaration that a sale deed was fraudulent and for an order to have it cancelled and a copy sent to the Sub-Registrar. It was held that the suit was one in which there was a distinct prayer for consequential relief. The Allahabad Full Bench ruling in *Karam Khan* v. *Daryai Singh* (2) was expressly dissented from. This decision is distinguishable as in the present suit there is no distinct prayer for consequential relief and it is not a suit for the cancellation of an instrument under section 39 of the Specific Relief Act.

Deokali Koer v. *Kedar Nath* (3) was a suit for a declaration that a mortgage deed was fraudulent and that a decree passed upon its basis had been fraudulently obtained and that the mortgaged property could not be sold for the satisfaction of the decree. It was held that the suit was not of the nature contemplated by section 42 of the Specific Relief Act and therefore was not a suit for a declaratory decree where no consequential relief is prayed. This view was confirmed by the fact that the plaintiff obtained an *interim* injunction restraining the defendant from executing the decree.

(1) (1904) I.L.R., 29 Bom., 207. (2) (1883) I.L.R., 5 All., 331.
(3) (1912) I.L.R., 39 Cal., 704.

We consider that the question of court fee must be decided on the plaint and the decision is not affected by the question whether the suit is maintainable under section 42, or by any action subsequently taken by the plaintiff to obtain an injunction otherwise than by amendment of the plaint.

Hakim Rai v. *Ishar Das* (1) is directly in point. The plaintiffs sued for a declaration that a decree obtained against them was based on fraud and was not enforceable. It was held that the substance and not the language of the plaint is to be looked at and that the suit must be *deemed to be* a declaratory suit in which consequential relief is prayed. We doubt whether this is a correct method of interpreting a fiscal statute.

The ruling in *Mst. Noowooagar Ojain* v. *Shidhar Jha* (2) is distinguishable as it was a suit under section 39 for the avoidance of a registered deed of gift. The forwarding of a copy of the decree to the registration office was held to amount to consequential relief.

The foregoing review of relevant decisions shows a conflict of judicial opinion without any clear preponderance on one side or the other. We hold that the court fee must be decided on the plaint. The plaintiff asks for a mere declaration. He studiously avoids asking for any consequential relief. The suit as framed therefore is clearly "to obtain a declaratory decree where no consequential relief is prayed". We are not concerned at the present stage with the question whether the suit is of the nature contemplated by section 42; or whether the court will refuse to grant a mere declaration on the ground that the plaintiff has omitted to ask for further relief, such as an injunction restraining the decree-holder from executing the decree; or whether the plaintiff has applied for stay of execution; or whether a mere declaration, if granted,

(1) (1927) I.L.R., 8 Lah., 531. (2) (1918) 3 Pat. L. J., 194.

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will serve any useful purpose. Fiscal statutes must be strictly construed. If the plaintiff chooses to take the risk of asking for a mere declaration without consequential relief he is, in our opinion, at liberty to do so under article 17(iii) upon payment of a fixed court fee of Rs. 10. When he has carefully refrained from asking for consequential relief we do not consider that he should nevertheless be *deemed* to have asked for consequential relief. This would be doing violence to the language of section 7(iv)(*c*). We hold that the plaint, as amended, is sufficiently stamped.

We therefore allow the appeal, set aside the decree of the trial court and direct that court to dispose of the suit according to law. The appellant will have his costs of this appeal. Costs in the court below will abide the result.

Before Mr. Justice Sen and Mr. Justice Niamat-ullah.

1931 *January*, 20.

RAGHUBIR SARAN AND ANOTHER (DEFENDANTS) *v.* HORI LAL AND ANOTHER (PLAINTIFFS).*

Jurisdiction—Decree passed by court without territorial jurisdiction—Objection of want of jurisdiction not raised in suit—Waiver—Separate suit to set aside the decree—Whether maintainable——Civil Procedure Code, section 21—*Civil Procedure Code, section* 11, *Explanation IV—Constructive* res judicata.

Where a decree has been passed by a court having no territorial jurisdiction over the matter in controversy, the defendant is entitled to maintain an independent suit for its avoidance, although he had not raised any objection as to want of jurisdiction in the former suit. Section 21 of the Civil Procedure Code does not provide against the question of jurisdiction being agitated by means of an independent suit, and it would not be legitimate to extend the bar of that section beyond the limits expressly provided for by it, namely, appellate or revisional stages of the original suit.

*Second Appeal No. 618 of 1928, from a decree of A. P. Ghildial, Additional Subordinate Judge, of Moradabad, dated the 31st of January, 1928, reversing a decree of Nand Lal Singh, Munsif of Chandausi, dated the 31st of January, 1927.