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By THE COURT:—Our answers to the questions referred to us are as follows: (1) Where the business to finance which money has been borrowed is a new business, the sons are not liable for the payment of the loan contracted by the father for this business, unless the transaction was for the benefit of the family and to the benefit of the estate or it was supported by legal necessity. (2) The payment of Rs. 3,000 should be considered to be a repayment partly of the debt incurred for the benefit of the ancestral business and partly for advancing the Delhi business, and appropriated accordingly.

MISCELLANEOUS CIVIL

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October, 4

Before Mr. Justice Niamat-ullah and Mr. Justice Collister
AKHLAQ AHMAD AND OTHERS (DEFENDANTS) v. KARAM
ILAH (PLAINTIFF)*

Court Fees Act (VII of 1870), schedule I, article 1; schedule II, article 17(iii)—Suit for declaration that a document, executed by plaintiff was void and ineffectual—Whether suit necessarily implies or involves cancellation of instrument—Plaint as a whole may amount to a prayer for cancellation—Ad valorem court fee payable—Specific Relief Act (I of 1877), section 39.

The plaintiff sued for a declaration that a sale deed executed by her was void and ineffectual as against her. The allegations in the plaint were that the defendant obtained from her, a *pardanashin* woman, the sale deed which she did not understand, that the defendant was asked many times to have the deed cancelled but he paid no heed to it and that owing to the subsistence of the said document it was apprehended that the plaintiff's proprietary right to the property would become extinct. *Held* that, taking the plaint as a whole, the suit clearly fell within the purview of section 39 of the Specific Relief Act; the allegations in the plaint clearly indicated that the plaintiff wanted something more than a mere declaration and wanted the instrument to be cancelled and got rid of; the plaint should therefore be construed as containing a definite prayer for cancellation and the court fee payable was an *ad valorem* court fee under schedule I, article 1 of the Court

*Stamp Reference in Second Appeal No. 1612 of 1931.

Fees Act, and not a court fee under schedule II, article 17(iii).

Per COLLISTER, J.:—A suit under section 39 of the Specific Relief Act for avoiding an instrument, even if there be no prayer for cancellation, carries with it by implication a prayer that the court may further use the discretion given to it by section 39 so as to order the said instrument to be delivered up and cancelled. The words “may sue to have it adjudged void or voidable” in section 39, therefore, imply a prayer for cancellation.

Per NIAMAT-ULLAH, J.:—In each case the question is one of construction of the plaint and of ascertaining the relief which the plaintiff is claiming. It is open to a plaintiff to sue for a declaration that a document is void or voidable without making it a suit falling within the purview of section 39, Specific Relief Act. It may be that such a suit is, in certain circumstances, liable to be dismissed under the proviso to section 42 of that Act on the ground that the plaintiff, being able to seek a further relief (e.g. cancellation), omits to do so. But, for all purposes of court fees, it is not open to a court to say that the plaintiff must be taken to have done what he should have done, though he persists in saying that he does not sue for cancellation.

Messrs. *Akhtar Husain Khan and Ishaq Ahmad*, for the appellants.

The Government Advocate (Mr. *Muhammad Ismail*), for the Crown.

COLLISTER, J.:—This matter arises out of a report of the Stamp Reporter. The plaintiff sued for a declaration that a sale deed which had been executed by her on 17th October, 1926, in favour of defendants Nos. 1 and 2, was void and ineffectual as against her. The plaint was stamped with a court fee of Rs.10 only. The defendants appealed, but their appeal was dismissed, and they have filed a second appeal in this Court; and on both appeals they have paid a court fee of Rs.10 only. The Stamp Reporter is of opinion that Rs.115 is now due from the plaintiff respondent and Rs.230 from the defendants appellants.

The learned Government Advocate supports the view taken by the Stamp Reporter, while counsel for the

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plaintiff pleads that his suit was under section 42 of the Specific Relief Act and that since he was asking for no consequential relief and was prepared to accept the consequences of not having claimed any such relief, the plaint was properly stamped.

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In *Radha Krishna v. Ram Narain* (1) it was held by a Bench of this Court that where a plaint, as amended, was to the effect that it be declared that a compromise and decree were ineffectual as against the plaintiff, the suit as framed was to obtain a declaratory decree where no consequential relief was prayed and therefore it was sufficiently stamped with a court fee of Rs.10, and the learned Judges expressed the opinion that the question of court fee must be decided on the plaint itself. In the course of its judgment the Court reviewed the decisions of other High Courts, in which there was a conflict of opinion. The case of *Mohammad Ismail v. Liyaqat Husain* (2) was also a case relating to a decree and my learned brother there observed: "The court has no right to say that the plaintiff should have claimed consequential relief and that, not having done so, he should be deemed to have claimed the consequential relief and is, therefore, liable to pay the court fees. If, having regard to the nature of his claim, the plaintiff ought to have claimed consequential relief and has not done so, his suit might fail under the proviso to section 42, Specific Relief Act. The question of court fee must be determined with reference to the plaint as it is and not as it ought to have been."

This case was referred to by a Bench of this Court in *Brij Gopal v. Suraj Karan* (3). In that case, the plaint as amended was for a declaration that an agreement and a will executed by certain deceased members of the family were null and void and did not bind the plaintiff and that certain property belonged jointly to the parties; and the learned Judges held that: "For the purpose of

(1) (1931) I.L.R., 53 All., 552 (2) [1932] A.L.J., 165.

(3) [1932] A.L.J., 466.

determination of the court fee the actual relief asked for should be looked into and it is entirely beside the consideration of the court whether the suit is likely or not to fail because the plaintiff did not ask for a consequential relief." The Court approved the decision in *Radha Krishna v. Ram Narain* (1). It will be observed that in that case the documents had not been executed by the plaintiff himself, but by certain unspecified deceased members of the family.

The case of *Kalu Ram v. Babu Lal* (2) was decided by a Full Bench of five Judges and this is the case which the Stamp Reporter has relied upon as authority for the view which he takes. In that case it was held that: "Where a suit is for the cancellation of an instrument under the provisions of section 39 of the Specific Relief Act, the relief is not a declaratory one. It falls neither under section 7(iv)(c) nor under schedule II, article 17(iii), but under the residuary article, namely schedule I, article 1 of the Court Fees Act." That case differs from the present one in that there was a prayer not only that a certain mortgage be adjudged void and ineffectual as against the plaintiffs, but also that it be cancelled; but at page 821 the Court observed: "A relief to have a registered instrument adjudged void or voidable, with the possible result of its being delivered up and cancelled and a copy of the decree being sent to the registration office for a note to be made by the registering officer in his books, is much more than a mere declaratory relief. It is undoubtedly a substantial relief of a nature differing from a declaratory one."

In *Lakshmi Narain Rai v. Dip Narain Rai* (3) the plaint as amended was for a declaration that the plaintiff was the owner in possession of the property in suit and that a certain decree be declared null and void. The court below had held that the plaintiff was in fact asking for a cancellation of the decree and that this being a

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(1) (1931) I.L.R., 53 All., 552. (2) (1932) I.L.R., 54 All., 812.

(3) (1932) I.L.R., 55 All., 274.

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consequential relief, an *ad valorem* court fee ought to be paid in accordance with the view expressed in *Kalu Ram v. Babu Lal* (1). The case was heard by a Bench of which my learned brother was a member, and they held that a court fee of Rs.10 only was payable. They followed the cases of *Radha Krishna v. Ram Narain* (2) and *Brij Gopal v. Suraj Karan* (3) and they distinguished the Full Bench case of *Kalu Ram v. Babu Lal* on the ground that in the latter case there was a distinct prayer for cancellation of the mortgage deed in suit.

A Full Bench of this Court in *Sri Krishna Chandra v. Mahabir Prasad* (4) held that: "Inasmuch as the plaintiff merely asked for a declaration that the previous decree was not in any way binding upon him and was altogether void and ineffectual, his suit was one for obtaining a declaratory decree only and fell under article 17(iii) of the second schedule of the Court Fees Act and the court fee payable was Rs.10 only." Thus it will be seen that that case also was concerned with a decree and not with an instrument. At page 794 the Court observed: "Obviously, the Full Bench (i.e. in the case of *Kalu Ram v. Babu Lal*) did not intend to lay down that where the plaintiff deliberately omits to claim a consequential relief and contents himself with claiming a mere declaratory decree, the court can call upon him to pay court fees on the consequential relief which he should have claimed although he has omitted to do so. What was held was that if the plaintiff does not ask for a mere declaratory decree, but also asks for a relief which he calls 'consequential' relief, the mere fact that he calls it so would not prevent the court from demanding full court fee, if in reality the additional relief claimed was a substantive relief and not a mere consequential relief. We do not think that the observation was intended to go further than this." The learned Judges go on however to say: "On the other hand, there is no doubt that so far as suits relating to the cancellation of instruments

(1) (1932) I.L.R., 54 All., 812.

(3) [1932] A.L.J., 466.

(2) (1931) I.L.R., 53 All., 552.

(4) (1933) I.L.R., 55 All., 791

are concerned, the Full Bench on page 821 clearly held that 'A relief to have a registered instrument adjudged void or voidable, with the possible result of its being delivered up and cancelled and a copy of the decree being sent to the registration office for a note to be made by the registering officer in his books, is much more than a mere declaratory relief. It is undoubtedly a substantial relief of a nature differing from a declaratory one.' It was clearly pointed out that it was not incumbent on a plaintiff to ask in express terms a relief for the instrument to be delivered up and cancelled and that he might merely ask for its being adjudged void or voidable. Nevertheless, a suit which falls under section 39 of the Specific Relief Act was held to be not a suit for obtaining a mere declaratory decree, but one for obtaining a substantive relief not otherwise provided for." They distinguished the case of a decree on the ground that a suit to avoid a decree does not strictly fall under section 39 of the Specific Relief Act.

The case of *Abdul Samad Khan v. Anjuman Islamia, Gorakhpur* (1) came before a Bench of which my learned brother was a member. The suit was for a declaration that a deed of gift executed by a *third person* in favour of the defendant was illegal and ineffectual as against the plaintiff and that the defendant had no right to interfere with the possession of the plaintiff. The Court, after referring to the cases of *Lakshmi Narain Rai v. Dip Narain Rai* (2) and *Sri Krishna Chandra v. Mahabir Prasad* (3), observed: "In the case before us, the plaintiff claimed no more than a declaration. If he might and ought to have claimed any further or consequential relief and has omitted to do so, he may have offended against the provisions of section 42 of the Specific Relief Act; but for all purposes of the Court Fees Act we have to consider merely the relief actually claimed by the plaintiff and not the relief which he ought to have claimed."

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(1)[1933] A.L.J., 1537.

(2) (1932) I.L.R., 55 All., 274.

(3) (1933) I.L.R., 55 All., 791.

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In *Babuwao v. Balajirao* (1) it was held by the court of the Judicial Commissioner of Nagpur that a suit which merely asks for a declaration of plaintiff's title to certain property and that a sale deed executed by him does not affect his title is really one for a declaration of title and cancellation of the sale deed and the court fee is on the value of relief under section 7(iv)(c) and (d) of the Court Fees Act.

In *Malikka Meladathil v. Kunji Achammal* (2) there were 25 plaintiffs in the suit, of whom Nos. 2—25 were minors. Plaintiff No. 1 sued for himself and as the next friend of plaintiffs Nos. 2—25. The suit was for a declaration that a sale deed be declared invalid and the said deed had been executed by all the members of the *tarwad* except plaintiff No. 1, the remaining plaintiffs being represented at the execution by their mothers. A Bench of the Madras High Court expressed the view that the prayer, so far as plaintiffs Nos. 2—25 were concerned, must be held to be a prayer for the cancellation of the deed and therefore an *ad valorem* court fee was payable.

There are, however, other rulings of various High Courts in which a contrary view is taken. As pointed out by this Court in *Radha Krishna v. Ram Narain* (3), there is a conflict of opinion on the subject. For instance, in *Umarannessa Bibi v. Jamirannessa Bibi* (4) the Calcutta High Court held that where the plaintiff alleged that she was in possession (as is the case here) and all she required was a declaration that the deed executed by her was not her deed and was inoperative, the proper court fee payable was Rs.10. In other cases it has been held that an *ad valorem* court fee is payable.

It appears to me that the observations by the Full Bench in the case of *Kalu Ram v. Babu Lal* (5), though more or less obiter, since there was a prayer for cancellation, are authority for the proposition that a suit

(1) (1928) 118 Indian Cases, 465. (2) (1910) 5 Indian Cases, 927.

(3) (1931) I.L.R., 53 All., 552. (4) A.I.R., 1923 Cal., 362.

(5) (1932) I.L.R., 54 All., 812.

under section 39 of the Specific Relief Act for avoiding an instrument, even if there be no prayer for cancellation, carries with it by implication a prayer that the court may further use the discretion given to it by section 39 so as to order the said instrument to be delivered up and cancelled. This view was taken by a Bench of this Court of which I was a member in *Suraj Ket Prasad v. Chandra* (1).

Chapter V, Specific Relief Act, itself is headed "Of the cancellation of instruments", and it seems to me that the words "and the court may in its discretion so adjudge it and order it to be delivered up and cancelled" contemplate that if a court sees fit to use its discretion so as to adjudge the document void, it will at the same time order it to be cancelled. In the circumstances, the words "may sue to have it adjudged void or voidable" appear to me to imply a prayer for cancellation. The present suit clearly falls under section 39 of the Specific Relief Act and it is significant that in paragraph 12 of the plaint the plaintiff states that "Defendant No. 3 was asked many times to get the said document cancelled by the defendants, but he paid no heed to it" and in paragraph 13 it is stated that "Owing to the subsistence of the said document it is apprehended that the plaintiff's proprietary right to the property will be extinct." The contents of these two paragraphs indicate that the plaintiff wanted something more than a declaration; she wanted the instrument to be cancelled and got rid of. In my opinion schedule II, article 17(iii) of the Court Fees Act is not applicable to this case; an *ad valorem* court fee is payable under schedule I, article 1, as though there had been a definite prayer for cancellation.

NIAMAT-ULLAH, J.:—I agree with my learned brother that, on a proper construction of the plaint in this case, the plaintiff must be taken to have sued for cancellation of the sale deed, dated 17th October, 1926, executed by herself. Taking the plaint as a whole, it is clear that

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(1) [1934] A.L.J., 955.

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the suit is one falling within the purview of section 39, Specific Relief Act. It is alleged that one of the defendants, taking advantage of the plaintiff's position as a helpless pardanashin woman, obtained from her the sale deed which she did not understand and which she did not intend to execute, that the defendant was repeatedly asked to have the "said document cancelled" and that the plaintiff apprehends that if the document is left outstanding "it will extinguish her proprietary rights". These allegations are followed by a prayer that the instrument be "declared" to be void and ineffectual against her. The word used in the original plaint is "*istiqrar*", which may also be translated in English as "adjudged", a word which is used in section 39 of the Specific Relief Act. It is quite correct to construe the last paragraph of the plaint, taking it in conjunction with the other allegations above referred to, as containing a prayer that the sale deed may be adjudged void.

In each case the question is one of construction of the plaint and of ascertaining the relief which the plaintiff is claiming. Whether he is rightly claiming the relief of declaration need not be considered where the question is one of court fee only. To my mind it is open to a plaintiff to sue for a declaration that a document is void or voidable without making it a suit falling within the purview of section 39, Specific Relief Act. It may be that such a suit is, in certain circumstances, liable to be dismissed under the proviso to section 42 of that Act on the ground that the plaintiff, being able to seek a further relief (e.g., cancellation) than a mere declaration, omits to do so. There is a class of cases in which it is imperative that a plaintiff should have an instrument set aside or cancelled. Even where it is not so imperative, but the plaintiff is "able to seek further relief", a mere declaration will not be granted. If a plaintiff deliberately prays for a mere declaration that an instrument is void and if the circumstances of the case are such that the document can be completely annulled, he

is, at least, "able" to have the instrument adjudged void, which implies that a copy of the decree annulling it shall be sent to the registration office for a note to be made on the copy therein retained, so that anyone searching and inspecting the registration office may at once find out that the document, though subsisting at one time, was subsequently annulled. In such a case his suit may be dismissed, being barred by the proviso to section 42, Specific Relief Act. But, for all purposes of court fee, it is not open to a court to say that the plaintiff must be taken to have done what he should have done, though he persists in saying that he does not sue for cancellation.

Another class of cases in which a plaintiff can sue virtually for a declaration that an instrument is void or voidable against him without suing for cancellation is where the instrument has been executed by several persons or affects the interests of several persons against some of whom it is not void or voidable and the plaintiff sues for a declaration of his right to property and of the invalidity of the instrument so far as it affects his interest in such property. In such cases declaratory relief does not necessarily imply the relief that the instrument may be "adjudged" void or voidable with the consequence of a note of annulment being made in the registration office and of the court ordering that the same be "delivered up and cancelled".

In the present case, however, the plaint is clearly one for cancellation, and I agree with my learned brother in holding that the suit is one under section 39, Specific Relief Act, and the plaintiff is liable to pay *ad valorem* court fee.

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