and treated as a suit and when an award is delivered a decree follows, and that accordingly it is open to this Court to permit the amendment of the application so as to include the relief in express terms for the recovery of the amount claimed. This would, to some extent, be tantamount to allowing the conversion of the application into a plaint with the proper relief. We would not ordinarily even entertain such an application, but there is only one point in favour of the respondent and it is that the period of limitation for the institution of a suit has apparently expired and the only other remedy, if this application is dismissed, would be to proceed to file the agreement in the Calcutta High Court under the Indian Arbitration Act. We therefore think that before we finally decide this point and also before we make up our minds as to the question of costs we should allow the case to stand out for five months to enable the respondent to move the Calcutta High Court. In the meantime we order that the proceedings in the court below be stayed.

Before Mr. Justice Harries and Mr. Justice Rachhpal Singh

KAILASH NARAIN (PLAINTIFF) *v.* GOPI NATH AND ANOTHER (DEFENDANTS)*

1935 *October*, 31

*Court Fees Act (VII of 1870), section 7(iv)(c); schedule II, article 17(iii)—Declaration—Further relief—Suit for a declaration that a certain decree is void, ineffectual and unenforceable as against the plaintiff—Cancellation not specifically prayed for—Relief of cancellation substantially and in effect prayed for—Construction of plaint for ascertaining whether a further relief was really and in effect prayed for, although only a declaration was expressly asked—*Ad valorem *court fee.*

The plaintiff sued for a declaration that a certain decree which the defendants had obtained against him *ex parte* was void, ineffectual and unenforceable. He alleged that during his minority his father had started an altogether new business with ancestral assets, that he had nothing whatsoever to do with it, and that he was in no way liable for the losses of that business,

*First Appeal No. 241 of 1931, from a decree of Brij Behari Lal, Civil Judge of Etawah, dated the 14th of March, 1931.

1935

KAILASH NARAIN v. GOPI NATH

in respect of which the decree had been passed. The plaint was filed on a court fee of Rs.10. An objection being raised that an *ad valorem* court fee was payable, the plaintiff made a statement that he did not want cancellation of the decree in question, which might stand against the assets of the business and even against the other joint family property, if any, and all that he wanted was a declaration that there was no personal liability on him:

Held, that if in a suit for a declaration the plaintiff deliberately avoids seeking further relief, then no doubt it is open to him to do so and the court can not insist that he should seek further relief and pay the court fees thereon; at the same time, however, the court has full power to look into the allegations made in the plaint in order to decide whether in a particular case the plaintiff is asking for a mere declaration or whether in substance and in effect he is asking for a declaration plus a further relief, although the suit may be so framed as to look like a suit in which a mere declaration is asked for. The court is entitled to see what is the real nature of the relief, and to look to the substance and not merely to the form of the plaint.

Where a plaintiff wants that a certain decree, obtained on a liability contracted by his father, is not binding upon him personally, and therefore the decree as against him must fall with it, he claims more than a mere declaration. In effect he wants that, so far as he is personally concerned, the decree passed against him should be cancelled and set aside. It cannot be said that a claim of this description amounts to only a mere declaration; accordingly an *ad valorem* court fee is payable, and not a court fee of Rs.10 only.

Sri Krishna Chandra v. *Mahabir Prasad* (1), explained.

Messrs. *Krishna Murari Lal* and *Gopalji Mehrotra*, for the appellant.

Dr. *N. C. Vaish*, for the respondents.

HARRIES and RACHHPAL SINGH, JJ.:—This is a plaintiff's appeal arising out of a suit for obtaining a declaration.

The facts of the case may be stated as follows. Babu Kailash Narain, plaintiff, is the son of Babu Bankey Lal. He instituted a suit to obtain a declaration that decree No. 5 of 1928 of the court of the Subordinate

(1) (1933) I.L.R., 55 All., 791.

Judge of Etawah, in Gopi Nath and another *v.* Bankey Lal and another, passed on the 27th of February, 1928, and obtained by the defendants cunningly, fraudulently and dishonestly against him *ex parte* was null and void, illegal, ineffectual and unenforceable. The plaintiff in his plaint alleged that during his minority he had been living with his maternal uncles, that during that period his father Bankey Lal started an altogether new business in the name of Bankey Lal Kailash Narain at Etawah, that the entire business was carried on by Bankey Lal on his own responsibility and that the plaintiff had nothing to do with it. It was further alleged in the plaint that according to law the plaintiff's father had no right to start any new business with the aid of the ancestral assets, nor was that business started with his agreement. It was therefore contended that the plaintiff could in no way be liable for any losses in connection with the aforesaid business. The case of the plaintiff was that the decree was prejudicial to his right.

It may be remarked that the plaintiff filed the plaint on a court fee of Rs.10 only. It appears that the munsarim of the court made a report to the presiding officer pointing out that the court fee paid was insufficient and that the plaintiff was liable for payment of the *ad valorem* court fee. Upon this the plaintiff made an application on the 28th of February, 1931, giving his reasons why, according to him, the court fee paid by him was sufficient. We may refer only to one of the clauses in this application where it is stated "that the plaintiff does not want cancellation of the *ex parte* decree in suit No. 5 of 1928, which may stand as it is against the assets of the firm Bankey Lal Kailash Narain, and even against the other joint family property, if any. All what he wants is that in a new trade started by the manager, as distinguished from ancestral business, there can be no personal liability on the minor coparcener, and a declaration to that effect only does

1935

KAILASH NARAIN v. GOPI NATH

never mean a cancellation of the *ex parte* decree No. 5 of 1928."

The learned Judge of the court below was of opinion that the plaintiff was liable for payment of *ad valorem* court fee and he therefore fixed a time limit within which the plaintiff should pay the additional court fee. The plaintiff, however, did not comply with that order and the court therefore rejected the plaint. The plaintiff has come up to this Court in appeal against that decision of the learned Subordinate Judge.

The principal question for consideration in this appeal is whether the court fee paid by the plaintiff was sufficient or whether he was liable for payment of the *ad valorem* court fee.

In cases of this description two questions often arise, and in order to avoid confusion it is very necessary that they should be distinct and apart from each other.

There are cases in which the plaintiff makes up his mind beforehand that he is not going to claim further relief and he deliberately so frames his suit as to avoid asking for further relief. In a case of that description all that the court has to see is whether on the allegations set forth in the plaint the suit is one for a mere declaration or it is a suit for further relief plus a declaration, though the real nature of the claim is concealed. In cases of this kind the plaintiff is certainly entitled to institute a suit for a mere declaration and he can say to the court that as no further relief is claimed by him the court fee paid by him is quite sufficient. This point has been made clear by a recent Full Bench decision of this Court in *Bishan Sarup* v. *Musa Mal* (1), to which one of us was a party. It was laid down in that case that where a plaint is so worded as to disclose a suit falling either under section 39 or section 42 of the Specific Relief Act, it is not open to a court to treat the suit as one falling within the purview of section 39 of the Specific Relief Act if the plaintiff desires it to be

(1) (1935) I.L.R., 58 All., 146.

construed as one under section 42 of the Specific Relief Act. The case definitely decides that it is not the function of the court in a case like this to insist that the plaintiff should seek further relief. The plaintiff is entitled to frame a suit in any manner he likes and there is no duty cast upon the court to give him advice that unless he seeks further relief his suit may not be successful. The plaintiff takes the consequences of his selection and he runs the risk of his suit being dismissed if later on it is found by the court that the case was one in which a further relief should have been asked by the plaintiff. The provisions of section 42 of the Specific Relief Act will then be applicable to the case and the court will refuse to grant a declaration to the plaintiff because he had failed to ask for further relief to which he was entitled.

Another question which arises in cases of this kind and which should be kept distinct from the question referred to above is whether the court can go into the question of insufficiency or otherwise of the court fee by looking into the allegations in the plaint. In *Bishan Sarup* v. *Musa Mal* (1), it has been laid down that the court is fully competent to go into this question. In this connection it is important to bear in mind the provisions of section 6 of the Court Fees Act which enacts that "except in the courts hereinbefore mentioned, no document of any of the kinds specified as chargeable in the first or second schedule to this Act annexed shall be filed, exhibited or recorded in any court of justice, or shall be received or furnished by any public officer, unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document." The meaning of this provision is perfectly clear and it is that it enjoins the court to see whether a document presented before it is sufficiently stamped. The powers of the court in the matter of rejection of plaint are governed by rule 11 of order

(1) (1935) I.L.R., 58 All., 146.

1935

KAILASH NARAIN v. GOPI NATH

VII of the Civil Procedure Code. Under its provisions the court is bound to reject a plaint if it finds that it is insufficiently stamped. It appears to us that the case of *Bishan Sarup* v. *Musa Mal* (1) is an authority for the proposition that the courts have ample power to decide on averments in the plaint whether the remedy for consequential relief or further relief has been sought. We may here quote the following observations which are to be found at page 180: "A plaint may, on the face of it, show that the plaintiff is only seeking to obtain a declaratory decree without asking for any consequential relief. But the substance of the plaint may demonstrate that as a matter of fact he is asking not only for a mere declaration but for consequential relief as well. The court will look to the substance and not merely to the form of the plaint."

In *Kalu Ram* v. *Babu Lal* (2), a Full Bench of five learned Judges of this Court made the following observations: "The court has to see what is the nature of the suit and of the reliefs claimed, having regard to the provisions of section 7 of the Court Fees Act. If a substantive relief is claimed, though clothed in the garb of a declaratory decree with a consequential relief, the court is entitled to see what is the real nature of the relief, and if satisfied that it is not a mere consequential relief but a substantive relief it can demand the proper court fee on that relief, irrespective of the arbitrary valuation put by the plaintiff in the plaint on the ostensible consequential relief." The same view, we may observe, has been taken in the case of *Bishan Sarup* v. *Musa Mal* (1).

The learned counsel appearing for the appellant has relied on the decision in the case of *Sri Krishna Chandra* v. *Mahabir Prasad* (3). In that case a Full Bench of this Court decided that where the plaintiff merely asked for a declaration that the previous decree

(1) (1935) I.L.R., 58 All., 146. (2) (1932) I.L.R., 54 All., 812.
(3) (1933) I.L.R., 55 All., 791.

19

KAILASH NARAIN v. GOPI

was not in any way binding upon him and was altogether void and ineffectual, then the suit was one for obtaining a declaratory decree only and therefore the court fee of Rs.10 was quite sufficient. It appears to us, however, that the decision in that case would cover only those cases in which on a perusal of the plaint the court comes to the conclusion that only a mere declaration was being sought by the plaintiff and that the plaintiff was not really claiming substantive relief. The only question before the court in that case was whether on the allegations as set forth in the plaint a court fee of Rs.10 was sufficient or not. The court found that there was no prayer for substantive relief and therefore held that the court fee of Rs.10 was sufficient. This is abundantly clear from the following observations which are to be found at page 794: "Obviously, the Full Bench 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."

In our opinion the ruling is no authority for the contention that it is not open to the court to look to the allegations in the plaint in order to see whether the suit was one for a mere declaration or whether in effect the plaintiff was claiming a further relief, though the real nature of the relief was concealed by him. The judgment in that Full Bench case was delivered by SULAIMAN, C.J., and we find the following observations made by him at page 794: "The learned advocate for the respondents has relied strongly on a passage at page 822 in *Kalu Ram* v. *Babu Lal* (1), where it was remarked that if a substantive relief is claimed, though clothed in the garb of a declaratory decree with a consequential relief, the court is entitled to see what is the real nature of the relief, and if satisfied that it is not a

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

1935

KAILASH NARAIN v. GOPI NATH

mere consequential relief but a substantive relief it can demand the proper court fee on that relief, irrespective of the arbitrary valuation put by the plaintiff in the plaint on the ostensible consequential relief. Obviously the Full Bench 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 had 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." It appears to us that what their Lordships of the Full Bench laid down was this: (1) If in a case the plaintiff deliberately avoids seeking further relief then it is open to him to do so and the court cannot insist that he should seek further relief and pay the court fees thereon; (2) The courts have, however, full power to look into the allegations made in the plaint in order to decide whether in a particular case the plaintiff is asking for a mere declaration or whether in effect he is asking for a further relief plus declaration.

We are not prepared to hold that there is anything in the Full Bench ruling of *Sri Krishna Chandra* v. *Mahabir Prasad* (1) which would curtail the powers of a court to look into the allegations in a plaint in order to find out whether the suit is one for a mere declaration or a suit in which a further relief is claimed though it is so framed as to look like a suit in which a mere declaration is asked for.

The result is that we have the authority of the Full Bench ruling of five Judges, *Kalu Ram* v. *Babu Lal* (2),

(1) (1933) I.L.R., 55 All., 791. (2) (1932) I.L.R., 54 All., 812.

in which it has been laid down that if a substantive relief is claimed, though clothed in the garb of a declaratory decree with a consequential relief, the court is entitled to see what is the real nature of the relief, and if satisfied that it is not a mere consequential relief but a substantive relief, it can demand the proper court fee on that relief irrespective of the arbitrary valuation put by the plaintiff in the plaint on the ostensible consequential relief. This proposition was accepted as correct in the case of *Sri Krishna Chandra* v. *Mahabir Prasad* (1).

We have further already pointed out that the same view as regards the power of the court was expressed in another Full Bench decision of this Court, *Bishan Sarup* v. *Musa Mal* (2). As we have mentioned above, the judgment in the case of *Sri Krishna Chandra* v. *Mahabir Prasad* was delivered by the CHIEF JUSTICE. We have before us a Bench case which has been recently decided and we understand that the judgment in that case also, *Muhammad Ikhlaq Khan* v. *Omprakash* (3), was delivered by the CHIEF JUSTICE. We may quote here the observations made in that case:

"No doubt the exact form in which the relief asked for was couched was somewhat narrow in its scope and merely asked for a declaration that the decree was void and invalid and ineffectual as against the plaintiff. In the rejected plaint the learned gentleman who drafted it made numerous points as the basis of attack on the previous decree. Among them there was an allegation in paragraph 6 that the mortgage deed on the basis of which the decree had been obtained was a fictitious document without consideration and in paragraph 8 it was stated that the document sued upon was fictitious and without consideration. In paragraph 11 it was said that the document was fictitious and without consideration. It seems to us that where a plaintiff wants that a certain decree obtained on a mortgage deed should be declared to be null and

(1) (1933) I.L.R., 55 All., 791. (2) (1935) I.L.R., 58 All., 146.
(3) (1935) F.A. No. 188 of 1933, decided on 22nd October, 1935.

1935

KAILASH NARAIN v. GOPI NATH

void and his point is that the mortgage deed was not binding on him and therefore the decree must fall with it, he claims more than a mere declaratory decree and payment of Rs.10 would not be sufficient."

These observations clearly go to show that the learned CHIEF JUSTICE was of opinion that in a case where ostensibly a suit appears to be only for a mere declaration, the court is entitled to go into the allegations in the plaint in order to see whether the court fee which has been paid is sufficient or not.

It appears to us, for the reasons given above, that it is always open to the court to find out by looking into the allegations in the plaint as to whether or not the court fee paid is sufficient. In fact it is a duty which is cast upon the court under section 6 of the Court Fees Act to which we have made a reference already. In the case before us we find that the plaintiff recites that his father started a new business with the aid of the ancestral funds, which he was not entitled to do. Further, he asserts that he is not liable for payment of any losses which his father might have incurred in connection with this new business. Then after that the plaintiff says that the defendants have cunningly and dishonestly obtained a decree against himself and his father which is not binding on him. In substance his plea is that a debt contracted by his father in connection with a new business started by him is not binding upon him personally. We may also take into consideration the petition of the plaintiff which he made on the 28th of February, 1931, in which he stated that he did not want the cancellation of the *ex parte* decree passed against him but that all he wanted was that it should be declared that in a new trade started by the manager, as distinguished from the ancestral business, there could be no personal liability on the minor coparcener and a declaration to that effect only does never mean a cancellation of the *ex parte* decree. When we consider the allegation of the plaintiff made in this petition it becomes clear that in substance the plaintiff

1935

KAILASH NARAIN v. GOPI NATH

asked for a further relief. In effect he wants that so far as he is personally concerned the *ex parte* decree against him should be cancelled and set aside and it cannot possibly be said that a claim of this description amounts to only a mere declaration. In these circumstances we are of opinion that the court below was right in holding that the plaintiff was liable for payment of the additional court fee. The decision of the court below must therefore be affirmed.

For the reasons given above we dismiss the appeal. The respondents will get their costs in this Court from the appellant.

Before Mr. Justice Harries and Mr. Justice Ganga Nath

JWALA PRASAD (DEFENDANT) *v.* PADMAVATI (PLAINTIFF)* 1936 *September*, 10

Civil Procedure Code, order II, rule 2—Suit by wife for maintenance—Subsequent suit by her for charging the maintenance on the husband's property—Same cause of action—Suit barred.

A Hindu wife brought a suit for maintenance against her husband and obtained a decree for the payment of Rs.25 per month for her maintenance. Subsequently she brought another suit for getting the said maintenance allowance charged on the husband's property, as she apprehended that the husband intended to transfer his property with a view to deprive her of the maintenance allowance:

Held that the second suit was barred by the provisions of order II, rule 2 of the Civil Procedure Code. It was open to the plaintiff to have prayed for a relief in her former suit to get her maintenance allowance charged on the property of her husband. Both the reliefs, namely that for getting a maintenance and that for having it charged on the property, arose out of the same cause of action; the mere ground that the plaintiff now entertained an apprehension that her husband might transfer his property did not afford her a new cause of action for the second suit.

Mr. *Gadadhar Prasad*, for the appellant.

Mr. *Shiva Prasad Sinha*, for the respondent.

HARRIES and GANGA NATH, JJ.:—This is a defendant's appeal and arises out of a suit brought against

*First Appeal No. 193 of 1933, from a decree of Muhammad Akib Nomani, Subordinate Judge of Agra, dated the 9th of February, 1933.