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959 it was stated: "Order XXXIV, rule 14 presupposes that a valid mortgage capable of enforcement subsists and that, if the mortgaged property is sold in execution of the simple money decree, the encumbrance created by the mortgage will continue to subsist." Learned counsel for the appellant admits that he cannot produce any ruling where the bar under order XXXIV, rule 14 was ever applied to a simple money decree under rule 6. In the case of *Kishan Lal* v. *Umrao Singh* (1) it was laid down, following an earlier ruling, that where the mortgage still subsists, order XXXIV, rule 14 bars the sale. The earlier ruling is in the case of *Madho Prasad Singh* v. *Baij Nath* (2). That was a case where the mortgagee elected to proceed on his personal remedy and to ask for a money decree only against the mortgagor, which he obtained, and it was held that he was barred from bringing the mortgaged property to sale without bringing a mortgage suit as the right to do so still subsisted.

We consider that the order of the lower court is correct, and accordingly we dismiss this execution first appeal with costs.

Before Mr. Justice Collister and Mr. Justice Bajpai

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January, 11

GOBIND RAO AND ANOTHER (PLAINTIFFS) *v.* GOBIND RAO AND OTHERS (DEFENDANTS)*

*Court Fees Act (VII of 1870), schedule I, article 1; schedule II, article 17(iii)—Declaration—Cancellation of instrument—Suit for a declaration that a certain mortgage decree was void and ineffectual—Cancellation of the mortgage deed sought, though not expressly, but in effect—Plaint as a whole may amount to a prayer for cancellation—*Ad valorem *court fee payable—Civil Procedure Code, section 149—Grant of time by appellate court to pay deficiency, for non-payment of which the plaint had been rejected.*

Where a plaintiff asks that a certain decree obtained on a mortgage deed should be declared to be null and void, and

*First Appeal No. 300 of 1934, from a decree of M. A. Nomani, Civil Judge of Gorakhpur, dated the 31st of July, 1934.

(1) (1908) I.L.R. 30 All. 146. (2) Weekly Notes 1905, p. 152.

his case as set forth in the plaint is that the mortgage deed itself was unlawful and void and therefore the decree must fall with it, he claims more than a mere declaratory decree and is in effect, though not in form, asking for the concellation of the mortgage deed; accordingly an *ad valorem* court fee is payable under schedule I, article 1 of the Court Fees Act.

The question of court fee has got to be decided on the allegations contained in the plaint and not necessarily by looking at the relief only and the garb in which it has been clothed, and the courts have ample power to look into the allegations of the plaint in order to find out the real nature of the relief which is claimed.

Further time was granted by the appellate court to the plaintiff to pay the deficiency in the court fee, for non-payment of which the plaint had been rejected by the first court.

Messrs. *P. L. Banerji, Sri Narain Sahai* and *Vidya Prasad Singh,* for the appellants.

Messrs. *S. K. Dar* and *Shiva Prasad Sinha,* for the respondents.

COLLISTER and BAJPAI, JJ.:—This is an appeal by the plaintiffs whose plaint was rejected on the ground that it was not sufficiently stamped with proper court fee. In the plaint the plaintiffs prayed for the following relief: "It may be declared under a decree that the final decree No. 129 of 1930, dated the 28th of November, 1931, in which preliminary decree dated the 30th of March, 1931, is merged, is altogether ineffectual and null and void." In the court below an objection was taken by the principal contesting defendant that the court fee paid by the plaintiffs was inadequate, and the court below thought it proper to decide the question of court fees first. By an order dated the 11th of July, 1934, that court held that the plaintiffs ought to pay *ad valorem* court fee and time was given to the plaintiffs to pay the same. On the 23rd of July, 1934, the plaintiffs applied for a reconsideration of the order, but on the 25th of July, 1934, the court said that there was "no reason to review and reconsider its former views", but time was extended for payment of the full court fee up to the 31st of July, 1934. The court fee not having

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been paid within the extended time, the plaint was rejected with costs to the opposite party on the 31st of July, 1934, and it is against this latter order that the present appeal has been filed.

It is contended on behalf of the plaintiffs appellants that the court fee of Rs.15 as paid by them was sufficient inasmuch as their suit was a pure and simple suit for a declaratory decree, and strong reliance is placed on the Full Bench case of *Sri Krishna Chandra* v. *Mahabir Prasad* (1), and another Full Bench case of this Court in *Bishan Sarup* v. *Musa Mal* (2). Learned counsel for the appellants has also drawn our attention to the cases of *Mohammad Ismail* v. *Liyaqat Husain* (3), *Brij Gopal* v. *Suraj Karan* (4), *Lakshmi Narain Rai* v. *Dip Narain Rai* (5), and *Abdul Samad Khan* v. *Anjuman Islamia* (6). We shall consider these cases in detail and we shall also consider the cases cited by learned counsel for the respondent.

There can be no doubt that under section 6 of the Court Fees Act it is the duty of the court before which any document is filed to see whether the document is sufficiently stamped or not, and under order VII, rule 11 of the Code of Civil Procedure the court shall reject a plaint if the plaint is written upon paper insufficiently stamped. There can also be no doubt that the courts have ample power to look into the allegations of the plaint in order to find out the real nature of the relief which is claimed, and the mere fact that the relief is clothed in the garb of a declaratory decree will not make the relief claimed a declaratory relief only, if the averments in the plaint show the contrary. This was held in the Full Bench case of *Kalu Ram* v. *Babu Lal* (7). This was a Full Bench case of five Judges, and at page 822 it was observed:

"The court has to see what is the nature of the suit and of the reliefs claimed, having regard to the provisions of sec

(1) (1933) I.L.R. 55 All. 791.
(2) (1935) I.L.R. 58 All. 146.
(3) [1932] A.L.J. 165.
(4) [1932] A.L.J. 466
(5) (1932) I.L.R. 55 All. 274.
(6) [1933] A.L.J. 1537.
(7) (1932) I.L.R. 54 All. 812.

tion 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. Suppose a plaintiff asks for a declaration that the defendant is liable to pay him money due under a certain bond and also asks for recovery of that amount; or suppose that he asks for a declaration that he is the owner of certain property and is entitled to its possession and asks for recovery of its possession; surely the reliefs for the recovery of money or for the recovery of possession cannot be treated as mere consequential reliefs which can be arbitrarily valued at any low figure and court fees paid on that arbitrary valuation only."

The position, therefore, is that whereas it is not permissible to a court to insist on the plaintiff claiming a consequential relief when the plaintiff has deliberately omitted to claim it and has confined himself to claiming a declaratory relief only, and thus to insist on the payment of *ad valorem* court fee, it is also clear that the question of court fee has got to be decided on the allegations contained in the plaint and not necessarily by looking at the relief only and the manner in which it has been clothed. If the allegations contained in the plaint are such as to make it possible to hold that the suit is one for a declaration only, the plaintiff undoubtedly is entitled to have it treated as such.

Looking at the plaint, it is clear that the plaintiffs alleged that a mortgage deed was executed by defendants Nos. 2 and 3 in favour of defendant No. 1 on the 12th of June, 1918, but the document was evidently invalid and not binding because defendants Nos. 2 and 3 were men of licentious and extravagant habits and the items of consideration entered in the mortgage deed were "fictitious and ostensible" and the little amount which was received "was spent in licentiousness and for unlawful purposes". The plaintiffs then went on to discuss the course which the trial of the earlier case took and

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alleged that by giving temptations to defendants 2 and 3 and by promising them to pay Rs.1,000 the claim was admitted and the decree obtained without contest. It was then said in paragraph 11 that the preliminary decree and the final decree, if allowed to stand, would be highly prejudicial to the plaintiffs and *their family property*, and in paragraph 13 it was stated that the suit was filed for *cancellation* of the final decree only, though its object was for *cancellation* of the proceedings of both the decrees. A perusal of the plaint makes it abundantly clear that the plaintiffs wanted to avoid the mortgage deed, dated the 12th of June, 1918, in other words to get it cancelled, and they also wanted the cancellation of the preliminary and the final decrees. When they came to draw up the relief paragraph in the plaint, they simply said that it should be declared that the preliminary and the final decrees in the former suit were altogether ineffectual and null and void.

In the court below learned counsel for the plaintiffs stated that the relief was "by implication for self only and not for anybody else", and before us learned counsel for the appellants unequivocally stated that the plaintiffs were concerned only with the decree so far as it affected their rights, but such statements can be of no value against the clear statements contained in the plaint. Even so far as the relief paragraph is concerned the declaration is sought in general terms and not limited to the plaintiffs alone, and in paragraph 13 of the plaint it is clearly stated that the suit was for cancellation of both the decrees. Other allegations in the plaint make it clear that the plaintiffs wanted to get rid of the mortgage deed dated the 12th of June, 1918, executed by defendants 2 and 3, the grandfather and father of the plaintiffs.

Under these circumstances the plaintiffs were liable to pay *ad valorem* court fee, as held by the court below, inasmuch as they wanted the cancellation of the mortgage deed dated the 12th of June, 1918, and the cancel-

lation of the decrees dated the 30th of March, 1931, and the 28th of November, 1931. The present case is to a certain extent governed by the Full Bench case of *Kalu Ram* (1), to which reference has already been made. We might also refer to the case of *Suraj Ket Prasad* v. *Chandra* (2). In this case the relief asked for by the plaintiff was as follows: "It may be declared by the court that (1) the compromise dated the 20th of November, 1919, (2) decree of the court of the Judicial Commissioner of Oudh passed in appeal No. 67 of 1917, and (3) decree No. 142 of 1925 of the court of the Subordinate Judge of Gonda are improper and void as against the plaintiff and do not in any way affect the plaintiff's rights." It was held that "the plaintiff in asking for a declaration that the compromise was improper and void as against the plaintiff was asking for the cancellation of this instrument and he was bound to pay *ad valorem* court fees under schedule I, article 1, of the Court Fees Act." The plaintiffs in the present case, when they asked for a declaration that the decrees passed in the mortgage suit were null and void and ineffectual, were, according to the allegations contained in the plaint, in effect asking for the cancellation of the mortgage bond on the basis of which the decree was obtained. It is true that in the case just referred to it was held that as no definite relief for the cancellation of the Gonda decree was sought, but only a declaration was asked for, the court fee of Rs.10 was sufficient; but in the case before us, looking at paragraph 13 of the plaint, we find that the claim was really for the cancellation of the two decrees.

In *Akhlaq Ahmad* v. *Karam Ilahi* (3) it was held by a Bench of this Court, to which one of us was a party, that where the plaintiff sues for a declaration that a sale deed executed by her in favour of the defendant is void and ineffectual as against her, *and the contents*

(1) (1932) I.L.R. 54 All. 812. (2) [1934] A.L.J. 955.
(3) (1934) I.L.R. 57 All. 638.

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of the plaint clearly indicate that the plaintiff wanted the sale deed to be cancelled and got rid of, article 17(iii) of schedule II of the Court Fees Act is not applicable and *ad valorem* court fee is payable under schedule I, article 1, as though there had been a definite prayer for cancellation; and reliance was placed on *Kalu Ram's* case (1).

In an unreported case, *Muhammad Ishaq Khan* v. *Om Prakash* (2), it was observed:

"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 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 18 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 void and his point is that the mortgage deed itself 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. On the other hand, if there was a bare allegation that he was not properly represented in the previous suit and the decree passed against him is on that ground void and invalid and ineffectual and that the previous suit should be restarted from the stage at which a proper guardian was not appointed, then the payment of Rs.10 may be sufficient."

In the case of *Kailash Narain* v. *Gopi Nath* (3) it was held that for the purpose of determining whether the plaint was sufficiently stamped it was open to the Court to look into 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

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

(2) F. A. No. 188 of 1933, decided on 22nd October, 1935.

(3) I.L.R. [1937] All. 259.

him. In the case before them their Lordships after a consideration of the plaint came to the conclusion that in effect the plaintiff wanted that so far as he was personally concerned the *ex parte* decree against him should be cancelled and set aside and therefore it could not possibly be said that the claim amounted only to a mere declaration. They held the view that the court fee paid by the plaintiff was insufficient and the plaintiff was liable for payment of *ad valorem* court fee.

The cases which we have just now discussed make it quite clear that the order of the court below demanding *ad valorem* court fee was a correct order.

It remains for us now to consider the cases cited by the appellants. In *Mohammad Ismail's* case (1) all that was held was that the court could not 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 was therefore liable to pay an *ad valorem* court fee on the consequential relief; for 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 of the Specific Relief Act. This contemplates a case where there are no allegations in the plaint from which it can be inferred that the plaintiff was in effect claiming a consequential or a substantive relief and not merely a declaratory relief.

The same may be said about *Brij Gopal's* case (2). It was held therein that "For the purpose of 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 plaint did not ask for a consequential relief."

The reliefs claimed in *Lakshmi Narain Rai's* case (3) were also declaratory reliefs and there were no allegations in the plaint from which it could be inferred that

(1) [1932] A.L.J. 165. (2) [1932] A.L.J. 466.
(3) (1932) I.L.R. 55 All. 274.

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the reliefs were clothed deliberately in a different garb in order to avoid the payment of court fees, and all that was held was that the reliefs being declaratory only, a court fee of Rs.10 was sufficient.

In *Abdul Samad Khan's case* (1) the suit was for a declaration, pure and simple, that a deed of gift executed by a certain 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 and the plaintiff paid a court fee of Rs.20 on the two declarations which he had sought, and it was held that the court fees paid were sufficient. This case does not throw any light on the question that we have got to decide and does not in any way militate against the view that we have taken.

There remains now the consideration of the two Full Bench cases in *Sri Krishna Chandra* v. *Mahabir Prasad* (2), and *Bishan Sarup* v. *Musa Mal* (3). In the former case the plaintiff claimed the following relief: "It may be held that Govind Prasad, defendant third party, did not in any way look after the rights of the plaintiff during the pendency of suit No. 65 of 1927 in the court of the Subordinate Judge of Ghazipur, and that he was guilty of gross negligence on account of which the plaintiff was greatly deprived of his rights, and it may be declared that the decree No. 65 of 1927 is not in any way binding upon the plaintiff and is altogether void and ineffectual." From the report of the case it does not appear what the allegations of the plaintiff were on which he sought the declaratory relief, but so far as the relief goes there can be no doubt that it was one for a pure declaration alone. As pointed out in the unreported case of *Muhammad Ishaq Khan* (4), where there is a bare allegation that the plaintiff was not properly represented in the previous suit and the decree passed against him on that ground was void and in-

(1) [1933] A.L.J. 1537.
(2) (1933) I.L.R. 55 All. 791.
(3) (1935) I.L.R. 58 All. 146.
(4) F. A. No. 188 of 1933, decided on 22nd October, 1935.

effectual and invalid, the payment of Rs.10 may be sufficient. The plaintiff was not claiming for the avoidance of any instrument nor was he in terms asking for the cancellation of the decree. In the second Full Bench case the two learned Judges who held that the court fee of Rs.20 on two declaratory reliefs was sufficient took the view that regard being had to the allegations in the plaint and to the statements made by the plaintiff's counsel the suit was not a suit under section 39 of the Specific Relief Act but was one under section 42 of the Specific Relief Act. NIAMATULLAH, J., observed that "the allegations contained in the plaintiff's plaint were such as to make it possible to hold that the suit was one for a declaration." As we have said before, for the purpose of determination of court fee the actual relief asked for should be looked into and the court has not to consider whether the suit is likely or not to fail because the plaintiff has not asked for a consequential relief. It may be necessary for the plaintiff to make a passing reference to certain instruments in asking for the declaration of his right, but a mere reference to such documents will not make the suit otherwise than one for a declaration. but where, as in the present case, a reference is made to an instrument and it is definitely stated in the plaint that the instrument is supported by fictitious and "ostensible" items of consideration, the matter assumes a different form. RACHHPAL SINGH, J., also concurred with NIAMATULLAH, J., and he said: "It appears to me that at the time when the question as regards the sufficiency or otherwise of the court fee paid arises, the court is fully competent to find out as to whether or not any consequential relief has been claimed in reality. If it finds that consequential relief has been claimed, then certainly the plaintiff will be liable for payment of *ad valorem* court fee. But if, on the other hand, the plaintiff deliberately takes care not to ask for a consequential relief, then it is not the function of the court to insist that the consequential relief

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should have been asked." The above passage shows that the learned Judge held the view that the court was fully empowered to find out on a perusal of the entire plaint as to whether or not any consequential relief has been claimed in reality. It is worthy of note that the same learned Judge was a member of the Bench in *Kailash Narain's* case (1), and came to the conclusion that the plaint allegations made it clear that the suit was not for a declaration only, but for the cancellation of an instrument.

We have discussed all the cases that were cited before us at the Bar, and we have come to the conclusion that the plaintiffs in the present case did not seek for a mere declaration and that the order of the court below demanding *ad valorem* court fee was justified. After we had delivered the judgment so far, a prayer was made on behalf of the appellants that they should be given some further time for making good the deficiency, and our attention was drawn to *Suraj Ket Prasad's* case (2) where a similar indulgence was granted. It might be said that there was some justification for the plaintiffs, in view of the Full Bench cases in *Sri Krishna Chandra* v. *Mahabir Prasad* (3) and *Bishan Sarup* v. *Musa Mal* (4), in taking the view that they were entitled only to pay court fee as on a declaratory relief, and as the questions raised in this case were of some complexity the plaintiffs were justified in coming to this Court for a final adjudication of the matter. We therefore think that a further opportunity should be given to the plaintiffs to make good the deficiency, if they are so advised.

If the deficiency in the amount of court fee is made good on or before the 11th of April, 1938, the appeal will be allowed, the order of rejection of the plaint will be set aside and the case sent back to the court for being restored to its original number on the pending file and disposed of according to law. If the amount of the defi-

(1) I.L.R. [1937] All. 259.
(2) [1934] A.L.J. 955.
(3) (1933) I.L.R. 55 All. 791.
(4) (1935) I.L.R. 58 All. 146.

ciency is not made good by the date mentioned above, the appeal shall stand dismissed with costs. The plaintiffs, in any event, will bear their own costs and pay the costs of the defendant.

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MISCELLANEOUS CIVIL

Before Mr. Justice Collister and Mr. Justice Bajpai

MANGAL PURI (PLAINTIFF) *v.* BALDEO PURI (DEFENDANT)*

1938 *February*, 2

Stamp Act (II of 1899), article 35(a)(i) and (viii)—Lease—Monthly tenancy of house, terminable by a month's notice—Lease "not for any definite term".

A lease creating a monthly tenancy of a house, terminable on a month's notice, and not mentioning any period of duration of the lease, is not a lease "purporting to be for a term of less than one year" and does not fall under article 35(*a*)(*i*) of the Stamp Act. A lease for less than one year means a lease for some specified period which is less than twelve months. The lease in question is for an indefinite period, and is a lease which "does not purport to be for any definite term" and falls under article 35(*a*)(*viii*) of the Stamp Act (as amended for the United Provinces).

The parties were not represented.

COLLISTER and BAJPAI, JJ.:—This is a reference by the District Judge of Jhansi under section 60(1) of the Stamp Act.

A document was filed in suit No. 26 of 1934 under which two houses were leased to certain persons and it was stipulated in the lease that if the owner wished to have the houses vacated, he was to give one month's notice. The Inspector of Stamps is of opinion that the document falls under article 35(*a*) (*iv*) of the first schedule of the Stamp Act, while the Civil Judge, in whose court the document was presented, is apparently of opinion that it falls under article 35(*a*)(*i*). Article 35(*a*)(*i*) provides that where the lease purports to be for a term of less than one year, duty should be charged at a certain rate, and article 35(*a*)(*iv*) [35(*a*)(*viii*) as amend-

*Miscellaneous Case No. 144 of 1936.