

1933
 NAGESHWAR
 SINGH
 v.
 SRIPAL
 SINGH.

*Raza and
 Nanavatty,
 J.J.*

attention to clause (3) of section 126 of the Oudh Rent Act, but that clause cannot help the respondents in this case as no "local custom" or "special contract" was set up in defence. There can be no presumption as to any "local custom" or "special contract." The plea ought to have been taken and established by evidence; but this was not done. New pleas cannot be raised in appeal and contentions, involving questions of fact put forward for the first time in appeal, should be rejected as too late.

The result is, that we allow this appeal with costs; and setting aside the decree of the learned Judge of this Court, dated the 26th of July, 1932, we restore that of the learned District Judge of Bara Banki, dated the 21st of July, 1931, with costs.

Appeal allowed.

APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava

1933
 February, 24

LALLO PRASAD (DEFENDANT-APPELLANT) v. SAHIBDIN SINGH AND ANOTHER (PLAINTIFFS-RESPONDENTS)*

Court-fee—Declaratory suit—Suit by sons that a decree obtained against their deceased father was not binding on them and that joint family property in their hands could not be attached in execution of it—Consequential relief, whether implicit in the declaration—Court-fee payable in the suit.

Where the plaintiffs brought a suit for a declaration that a decree obtained against their father who was dead was not binding on them and that the joint family property which they had obtained by right of survivorship was not open to attachment in execution of the said decree, held, that the consequential relief was implicit in the declaration asked for and that an *ad valorem* court-fee was payable on the suit.

* Second Civil Appeal No. 191 of 1932, against the decree of Pandit Krishna Nand Pande, Additional Judge of Unao, dated the 12th of May, 1932.

Sripal Singh v. Jagdish Narayan (1), *Venkappa v. Harasinha* (2), *Shama Pershad Sahi v. Sheopersan Singh* (3), and *Hakim Rai v. Ishar Das Gorkh Rai* (4). referred to and relied on.

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Mr. *Salig Ram*, for the appellant.

SRIVASTAVA, J. :—On the 24th of March, 1931, the defendant obtained a simple money decree against the father of the plaintiffs. The father is now dead and the plaintiffs brought a suit for a declaration that the decree is not binding on them and that the joint family property which they have obtained by right of survivorship is not open to attachment in execution of the said decree. Court-fee was paid in the trial court as well as in the lower appellate court and in this Court on the footing of the suit being one for a mere declaration. The office has reported that in such a suit *ad valorem* court-fee is payable as the declaration sought amounts in effect to a cancellation of the decree and must therefore be deemed to carry with it a consequential relief.

It is contended on behalf of the parties that the suit must be regarded as purely declaratory unless a consequential relief is asked for in express terms in the plaint. The same contention was raised in *Sripal Singh v. Jagdish Narayan* (1). It was held that the contention was negatived by a long series of cases in which it had been consistently held that it is the substance of the prayer which must be looked to. In my opinion the obvious result of the decree asked for by the plaintiffs would be to save them from payment of the decretal money for which the joint family property in their hands is liable under section 53 of the Code of Civil Procedure. Under the circumstances I am of opinion that the consequential relief is implicit in the declaration asked for. This view is supported by the decisions in *Venkappa v. Narasinha* (2), *Shama Pershad Sahi v. Sheopersan Singh* (3) and *Hakim Rai v. Ishar Das Gorkh Rai* (4). I must

(1) (1921) 24 O. C., 361.

(2) (1887) I. L. R., 10 Mad., 187.

(3) (1917) 5 P. L. J., 394.

(4) (1927) I. L. R., 8 Lah., 531.

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therefore accept the office report. The plaintiff must make good the deficiency of Rs.39-8 in the court-fee for the court of first instance, Rs.32-12 for deficiency in the lower appellate court and Rs.40 for deficiency in the court-fee paid in this Court, total Rs.112-4. The defendant also will make good the deficiency of Rs.8 in the court-fee paid by them in the lower appellate court and of Rs.4 in this Court, total Rs.12.

Both the parties will be allowed one month's time within which to make good the deficiency.

FULL BENCH

Before Mr. Justice Muhammad Raza, Mr. Justice Bisheshwar Nath Srivastava, and Mr. Justice H. G. Smith

1932
December, 17

GAURI SHANKAR VARMA (APPLICANT) *v.* THE MUNICIPAL BOARD, SITAPUR (OPPOSITE-PARTY)*

United Provinces Municipalities Act (II of 1916), sections 2(7) and 128(1)—Words "carrying on business" in section 2(7), meaning of—Inhabitant tax—"Inhabitant", definition of—Subordinate Judge residing outside Municipal limits but performing the duties of his office within Municipal limits—Subordinate Judge, whether liable for the tax.

A Subordinate Judge not residing within Municipal area but performing the duties of his office as Subordinate Judge within that area cannot be regarded as "carrying on business" within the Municipal area within the meaning of those words as used in the definition of "inhabitant" in section 2(7) and as such is not liable to a tax on inhabitants under section 128(1) of the United Provinces Municipalities Act (II of 1916).

No one for the applicant.

Mr. *Nisar Ahmad*, for the opposite-party.

RAZA, SRIVASTAVA, and SMITH, JJ. :—This is a reference under section 162 of the United Provinces Municipalities Act, 1916.

Babu Gauri Shankar Varma, who was a Subordinate Judge at Sitapur, was assessed by the Tax Committee

*Civil Reference No. 1 of 1932, made by G. L. Vivian, Esqr., Deputy Commissioner of Sitapur, by his order dated the 27th of May, 1932.