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Mahant Damodar Das v. Raj Kumar Das.

Dawson Miller, C. J.

The only other question raised is whether on the facts stated there was sufficient cause for the defendant's failure to appear. The learned Judges who remanded the case thought that the facts disclosed, which are not in dispute, were sufficient cause for the defendant's non-appearance; and, after considering the matter further, I am not prepared to differ from the conclusion at which they arrived. The appeal will be allowed, the decree of the District Judge will be set aside and the case restored to his file for hearing.

COUTTS, J.—I agree.

Appeal allowed.

APPELLATE CIVIL.

Before Das and Bucknill, JJ.

SURENDRA NARAIN SINGH

v.

SHAMBIHARI SINGH.*

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May, 27.

Court-Fees Act, 1870 (Act VII of 1870), section 7 (IV) (c)—Suit for declaration with consequential relief—Hindu Law—joint family—sale of property in execution of decree obtained against two brothers on a handnote—suit for declaration that sale not binding on plaintiffs' shares.

Where the members of a joint Hindu family sued for a declaration that a sale of joint family property held in execution of a decree obtained on a handnote against two members of the family was null and void to the extent of the plaintiffs' shares in the property, *held*, that the suit was in fact a suit for a declaration with consequential relief.

Chingacham Vitil Sankaran Nair v. *Chingacham Vitil Gopala Menon* (1), and *Shrimant Sagajirao Khanderav Naik Nimbalkar* v. *S. Smith* (2), not followed.

*First Appeal No. 84 of 1921.

(1) (1907) I. L. R. 30 Mad. 18. (2) (1896) I. L. R. 20 Bom. 736.

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Zinnatunnessa Khatun v. *Girindra Nath Mukerjee* (1), *Deokali Koer* v. *Kedar Nath* (2), *Lachmi Narain* v. *Gauri Shankar* (3), *Bankey Behari* v. *Ram Bahadur* (4), *Musammat Noowoagar Ojain* v. *Shidhar Jha* (5), and *Rani Kamal Mukhi Kuer* v. *Udit Narain Singh* (6), *referred to.*

The facts of the case material to this report are stated in the order of the Taxing Officer.

Sheonandan Roy and *A. C. Das*, for the Appellants.

Taxing Officer—Plaintiffs 1 to 4 are sons of defendant No. 2 who is a brother of defendant No. 1. Plaintiffs 5 to 7 are their female relations. Defendants 1 and 2 were sued in respect of a handnote executed by them in favour of the principal defendants, who obtained an *ex-parte* decree in execution of which they attached and sold the joint-family property. In this suit the plaintiffs challenge the validity of the handnote, the decree, the attachment and the sale, both as a whole and so far as the attachment and sale affect the shares of all the members of the joint family except defendants 1 and 2. The formal reliefs claimed are :—

"(1) That it may be declared that the property in suit is the joint-family property of the plaintiffs and *pro forma* defendants and that it is not the exclusive property of the *pro forma* defendants and and that the plaintiffs' shares in the said property are 13-annas 1-pie 8/15-karant, and that these shares are not liable for the payment of the said decree, and the said attachment, and the sale are null and void to the extent of the shares of the plaintiffs, and the principal defendants have acquired no title by the said auction-purchase in the entire property in suit and that they have purchased only the right, title and interest of the *pro forma* defendants 1 and 2, 2-annas 10-pies 7/15-karant shares of the property.

"(2) That any further reliefs to which the plaintiffs may be entitled may be granted to them."

The plaintiffs valued the reliefs sought at Rs. 29,000 but paid a court-fee of Rs. 10 as on a suit for a declaration. They secured from the lower court an order staying delivery of possession of the property to the defendants-purchasers pending the disposal of the suit.

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(1) (1903) I. L. R. 30 Cal. 788.
(2) (1912) I. L. R. 39 Cal. 704.
(3) (1886) 6 All. W. N. 54.
(4) (1919) 4 Pat. L. J. 191.
(5) (1918) 3 Pat. L. J. 194.
(6) F. A. No. 102 of 1920 (unreported).

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The court held that the plaint was sufficiently stamped as a suit for a mere declaration and relied upon *Chingaham Vitil Sankaran Nair* v. *Chingacham Vitil Gopala Menon* (1) but on the merits dismissed the suit. The plaintiffs appeal.

On behalf of the revenue it is contended that the suit as framed is one for a declaratory decree and consequential relief and falls under section 7 (*iv*) (*c*) of the Court-Fees Act, so that an *ad valorem* fee is payable.

On behalf of the appellants it is urged that the prayer is merely one for a declaration and it is admitted that in an attempt to save court-fee the plaint was framed on the lines of the case reported in *Zinnatunnessa Khatun* v. *Girindra Nath Mukerjee* (2). The question therefore is whether, in the words of Jenkins, C. J., in *Deokali Kuer* v. *Kedar Nath* (3), the attempted evasion of the statutory provisions as to court-fee is successful.

The proposition that the mere fact that the prayer is cast in the form for a declaration does not necessarily mean that it is not in fact a prayer for consequential relief and that *ad valorem* court-fee has not to be paid, is well established [Order of the Taxing Judge, dated the 14th January, 1920, in *Rani Kamal Mukhi Kuar* v. *Udit Narain Singh* (4)].

In the present case it is to be observed that by an order staying delivery of possession the plaintiffs practically obtained a relief in the suit. But apart from that they came into court to meet the challenge thrown upon their title. *Inter alia* they pray that it be declared that their shares are not liable for the payment of the said decree and the said attachment and sale are null and void to the extent of their shares. It is clear that if they had not made this prayer, their suit could not have been entertained by reason of the proviso to section 42 of the Specific Relief Act.

Thus the suit is not one for a mere declaration, but the relief No. 1 implies consequential relief without which claim the prayer for declaration would have been unentertainable under the provisions of section 42.

(1) (1907) I. L. R. 30 Mad. 18.
(2) (1903) I. L. R. 30 Cal. 788.
(3) (1912) I. L. R. 39 Cal. 704.
(4) F. A. No. 102 of 1920.

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The only difference between *Lachmi Narain* v. *Gauri Shanker* (1) and the present case is that the prayers for injunction was, in the Allahabad case, made in the plaint, whereas in the present instance the prayer in the plaint is that the plaintiffs' "shares are not liable for the payment of the said decree, and the said attachment and sale are null and void to the extent of the shares of the plaintiffs", the stay of sale being obtained by an order in the suit. This difference is immaterial. In *Deokali Koer* v. *Kedarnath* (2) the prayer for a temporary injunction granted in the suit was held by Jenkins, C. J., to be a consequential relief. The case is similar to *Bankey Behari* v. *Ram Bahadur* (3) in which the plaint framed on the same lines as the plaint under consideration, was held by the court to constitute a suit for a declaratory decree with a consequential relief.

As regards the ruling in *Chingacham Vitil Sankaran Nair* v. *Chingacham Vitil Gopala Menon* (4) it is sufficient to state that it is contrary to the view taken by the Taxing Judge in *Mussammat Noowoodgar Ojain* v. *Shidhar Jha* (5). Chief reliance is placed upon *Zinnatunnessa Khatun* v. *Girindra Nath Mukherjee* (6) and it is urged that it is not correct to say that this case has been superseded by *Deokali Koer* v. *Kedarnath* (2). But the latter ruling has been followed in many cases in this court while the case upon which *Zinnatunnessa Khatun* v. *Girendra Nath Mukerjee* (6) is based, namely, *Shrimant Sagajirao Khanderao Naik Nimbalkar* v. *S. Smith* (7) has itself not been followed by the Taxing Judge of this court. It also seems to ignore the provisions of section 42 of the Specific Relief Act.

It appears to me that the plaintiffs cannot evade the payment of *ad valorem* court-fee by reason of the form into which they have thrown their plaint. That is to say, their device is unsuccessful. Accordingly I hold that the appellants must pay the deficit court-fee of Rs. 945, that is, the defference between the *ad valorem* fee of Rs. 955 on jurisdiction valuation of Rs. 29,000

(1) (1886) 6 All. W. N. 54.
(2) (1912) I. L. R. 39 Cal. 704.
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(5) (1918) 3 Pat. L. J. 194.
(6) (1903) I. L. R. 30 Cal. 788.
(7) (1896) I. L. R. 20 Bom. 736.

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and the fee of Rs. 10 paid on the memorandum of appeal. The payment should be made by the 8th of January. The question of payment of the deficit on the plaint will be considered after the realization of the deficit court-fee on the memorandum of appeal.

[*Note*—Subsequently the Vakil for the plaintiffs appellants argued that the plaintiffs-appellants should be required to pay court-fee on the value of their share in the property sold and not on the value of any larger share. An examination of the plaint showed, however, that the value of the plaintiffs' share was Rs. 29,000 the jurisdiction value of the suit, on which the Taxing Officer had in the above order assessed court-fee.

The appellants then paid the deficit of Rs. 945 on the memorandum of first appeal and the appeal was admitted and registered. Thereafter, the appellants were called upon by the Registrar to make good the deficiency of Rs. 945 due from them on their plaint, and as they declined to pay, the Registrar placed the appeal before the proper Bench for orders.]

DAS AND BUCKNILL, JJ.—The view taken by the learned Registrar is entirely correct. The appellant must make good the deficiency within a month from to-day. If the deficiency is not made good within a month from to day, let the matter be put up to the Bench for disposal.

[*Note*—The deficiency of Rs. 945 due on the plaint was also paid.]

APPELLATE CIVIL.

Before Das and Adami, JJ.

GOLAM NABI

v.

CHOWDHURY BASUDEB DAS *

1921

December, 2.

Jagir——*construction of* sanad——*grant to grantee and his heirs, effect of*——*Cuttack Land-Revenue Reg. 1805* (*Ben. Reg XII of 1805*), *sections 25 and 34*——*Bengal Revenue Free* (Badshahi *Grants) Regulation, 1793* (*Ben. Reg. XXXVII of 1793*), *Section 15.*

Where a *sanad* made a grant of a *jagir* of certain properties in the district of Cuttack to the grantee and his heirs, *held*, that the grantee took an absolute and hereditary interest in the properties

* Circuit Court Cuttack. Appeal from Original Decree No. 14 of 1919 from a decision of Babu Pramatha Nath Bhattacharji, Sub-Judge of Cuttack, dated the 20th August, 1919.