FULL BENCH.

Before Dawson Miller, C. J., Mullick, Jwala Prasad, Coutts and Das, J.J.

RAM SUMRAN PRASAD

v.

GOBIND DAS.*

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August, 1.

Court-Fees Act, 1870 (*Act VII of* 1870), *sections* 7(iv)(c) *and* (v)—*Hindu Law—alienation by widow—suit by reversioners for recovery of possession, court-fee payable on.*

Alienations of the property of a deceased Hindu by his widow, are invalid as against the reversioners unless justified by law.

Bijoy Gopal Mukerji v. *Krishna Sahaishi Debi*(1), followed.

Held, therefore, by the Full Bench (Coutts, J. dissenting) that a suit by the reversioners after the death of the widow for a declaration that the alienations were not binding on them and for recovery of the properties alienated by her was governed by section 7(*v*) of the Court-Fees Act, 1870, and not by section 7(*iv*)(*c*).

Ugramohan Choudhry v. *Lachmi Prasad Choudhry*(2), *Kshetra Mohan Mahapatra* v. *Ganesh Lal Pandit*(3), distinguished.

Ram Sanehi Tewari v. *Mahadeo Upadhya*(4), referred to.

Where a declaration is neither necessary nor in terms asked for a suit should not be treated as one falling within section 7(*iv*)(*c*).

Appeal by the plaintiffs.

Jainti Kumari, the widow of Banarsi Prasad, having died in 1916, the plaintiffs instituted the

*First Appeal No. 189 of 1922.

(1) (1907) I. L. R. 34 Cal. 329; L. R. 34 I. A. 87.

(2) (1920) 5 Pat. L. J. 339. (3) (1921) 6 Pat. L. J. 101.

(4) (F. A. 242 of 1917). *See* p. 126, footnote (3), *post*.

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present suit as the reversioners of Banarsi Prasad, to recover a portion of the latter's estate which the widow had conveyed to the defendants by deed of gift. On their plaint the plaintiffs paid a court-fee calculated upon ten-times the Government Revenue. The first Court held that the court-fee was sufficient but dismissed the suit on other grounds. The plaintiffs appealed to the High Court and paid on their memorandum of appeal the same amount of court-fee as had been paid on the plaint.

The Stamp Reporter objected that both the plaint and memorandum of appeal were insufficiently stamped. The Taxing Judge held that the case was covered by the decision in *Lagan Bart Kuer* v. *Khakhan Singh* (1), and directed that the deficit court-fee should be levied accordingly. On the matter being placed before a Division Bench (Dawson Miller, C. J. and Mullick, J.), their Lordships directed the matter to be placed before a Full Bench on the ground that there seemed to be a conflict of opinion between the decision in *Kshetra Mohan Mahapatra* v. *Ganesh Lal Pandit* (2) and the decision in *Ram Sanehi Tewari* v. *Mahadeo Upadhyay* (3).

The facts of the case material to this report are stated to the order of the Taxing Officer, which was as follows :—

This is a court-fee matter. The owner of the property in suit was Banarsi Prashad. On his death his widow Jainti Kuar succeeded to it as Hindu widow and executed on the 28th July, 1901, a deed of gift in favour of her son-in-law. Upon her death the plaintiffs, as reversioners, desired to take possession of the property in suit but the son-in-law

(1) (1913) 3 Pat. L. J. 92. (2) (1921) 6 Pat. L. J. 101.

(3)(F. A. No. 242 of 1917, decided by Roe, J., on the 14th August, 1917, in which His Lordship's order was as follows :—

"These cases are covered by *ratio decidendi* in 34 C. 329. A reversionary heir has *prima facie* a right of entry on the death of the tenant for life. If obstructed he may bring a suit for possession. The defendants are required to disclose a bar to the reversioner's re-entry. It is immaterial that the plaintiff has himself disclosed the bar which may be set up provided that bar is one which he may treat as a nullity. The suit should be taxed under section 7(*v*) as a simple suit for the possession of land, plus an *ad valorem* fee on the mesne-profits.

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(defendant in this suit) resisted their application in the Land Registration Department on the strength of his deed of gift. They then sued for possession, valuing the property at Rs. 50,000, but paying a court-fee of Rs. 150, calculating the court-fee on ten-times the Government revenue of the landed properties in suit covered by the deed of gift.

The Stamp Reporter urges that the suit falls under section 7 (*iv*) (*c*) of the Court-Fees Act and that the court-fee is *ad valorem* on the jurisdictional value, which is also the market value of the property in dispute. His contention is that the plaintiffs cannot treat the deed of gift as a nullity as it is a bar to their suit for possession until declared void. It is true that they do not, among the reliefs, pray for a declaration of the invalidity of the deed of gift; but he contends that in view of their own allegations in the body of the plaint in which they dilate upon the invalidity of that gift, it is a bar to them and they cannot get possession until that bar is removed. He relies upon *Lagan Bart Kuer* v. *Khakhan Singh* (1) and *Kshetra Mohan Mahapatra* v. *Ganesh Lal Pandit*(2) and especially upon the latter, and would assess the court-fee in each court at Rs. 1,175, so that a deficit of Rs. 1,025 would be claimable by the revenue in each case.

On behalf of the appellants reference is made to Mitra's *Limitation Act*, page 259, where, on the strength of the ruling in *Bijoy Gopal Mukerjee* v. *Krishna Debi*(3) and other cases, it is contended that for the purpose of limitation against the reversioners the starting point is not the deed of gift. It also appears that though there was a denial in the written statement that the plaintiffs are reversioners of Banarsi Prasad, yet in point of fact there was no contest on the point. Finally, it is contended that in the reliefs the prayer is only that as the heirs and reversioners of Banarsi Prashad, plaintiffs are entitled to get possession of the property in suit on the death of Jainti Kuar and that the defendant wrongfully retains possession. The last point is not quite correct because the relief begins: "On consideration of the facts stated above it may be held by the court, *etc.*," which commencement, to some extent at least, imports reference to the deed of gift executed by the widow in favour of the defendant which the plaintiffs assert in the plaint to be invalid.

As to the first point the Taxing Judge in *Ram Sanehi Tewari* v. *Mahadeo Upadhya*(4), which was a very similar case, considered that the *ratio decidendi* in *Bijoy Gopal Mukerjee* v. *Krishna Mahishi Debi*(3) applied. He said: "The reversionary heir has *primâ facie* a right of entry on the death of the tenant for life. If obstructed he may bring a suit for possession. The defendants are required to disclose a bar to the reversioner's re-entry. It is immaterial that the plaintiff has himself disclosed the bar which he may set up provided that that bar is one which he may treat as a nullity. The suit should be taxed under section 7(*v*) as a simple suit for the possession of land." The important words here would appear to be "provided that the bar is one which he

(1) (1918) 3 Pat. L. J. 92. (2) (1921) 6 Pat. L. J. 101.
(3) (1907) I. L. R. 34 Cal. 329; L. R. 34 I. A. 87.
(4) F. A. No. 242 of 1917. *See* p. 125, footnote (3), *ante*.

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may treat as a nullity". The land registration proceedings are very often decided on the question of possession, and the present suit is one to recover property from illegal possession. On the other hand, reliance is placed on behalf of the revenue upon the decision in *Kshetra Mohan Mahapatra* v. *Ganesh Lal Pandit*(1), and reference may also be made to the observations at *Hari Ram* v. *Akbar Husain*(2) as to the applicability of the Privy Council ruling cited, to the interpretation of the Court-Fees Act. It is perhaps also not very clear how far, in *Kshetra Mohan Mahapatra* v. *Ganesh Lal Pandit*.(1), the Division Bench overrules the view of the Court-Fees Act taken by Mr. Justice Roe as Taxing Judge in the case of *Ram Sanehi Tewari* v. *Mahadeo Upadhya*(3).

As regards the question whether the defendants admitted or denied that the plaintiffs were reversioners of Banarsi Prasad it does not appear to be material to the present issue.

On the third point, namely, that in "the reliefs the prayers do not include a claim for a declaration that the deed of gift is not binding upon the plaintiffs", reference may be made to the decision of a Division Bench in Civil Revision No. 80 of 1921. There Das J., said, "If the plaintiff is entitled to relief on the allegations made in the plaint, then the Court is bound to give him that relief whether he has asked for that relief or not". It would appear, therefore, that a mere failure to ask expressly for a relief which has to be granted in order that the plaintiff may succeed, will not avail the plaintiff to free him from liability to court-fee on that relief.

The matter is, however, one of comparatively frequent occurrence. It is also certainly important; and in view of the decisions in *Ram Sanehi Tewari* v. *Mahadeo Upadhya*(3) (whose the Taxing Officer was of opinion that unless the alienations by the widow were got rid of it was impossible that the plaintiff's appeal should succeed) and *Kshetra Mohan Mahapatra* v. *Ganesh Lal Pandit*(1), the position is obscure. Accordingly under the provisions of section 5 of the Court-Fees Act, 1870, I refer the matter to the Taxing Judge.

Susil Madhab Mullick, for the appellants.

Sultan Ahmed, Government Advocate, for the Crown.

DAWSON MILLER, C. J.—This matter came before a Division Bench on a question of court-fees in an appeal preferred to this Court on behalf of the plaintiffs. The plaintiffs, as the reversionary heirs of Banarsi Prasad, instituted the suit to recover possession of a portion of his estate to which they were entitled as reversionary heirs on the death of his widow Jainti Kumari. The defendant claims to be in possession of the property in suit under a deed of gift

(1) (1921) 6 Pat. L. J. 101. (2) (1907) I. L. R. 29 All. 749, F.B.
(3) F. A. No. 242 of 1917. *See* p. 126, footnote (3), *ante*.

executed by Jainti Kumari during her life-time. She died in 1916 and the plaintiffs on endeavouring to obtain possession and to have their names entered in Register *D* in the Land Registration Department were opposed by the defendants who set up the deed of gift executed by the widow. The plaint alleges that the plaintiffs are the next reversionary heirs of Banarsi Prasad and that the property in suit formed part of his estate, that his widow Mussammat Jainti Kumari, after his death, came into possession by right of inheritance as a Hindu widow and that on her death the plaintiffs became entitled to possession but that their possession was opposed by the defendants who set up a deed of gift executed by Jainti Kumari. They further plead that the deed of gift made by the widow is not legally binding on the plaintiffs and that the defendant is not entitled to retain possession. There are other allegations which it is unnecessary to refer to in detail. In the prayer portion of their plaint they claim the following reliefs :—

(1) That on consideration of the above facts the Court may be pleased to hold that the properties in dispute constitute the estate of Babu Banarsi Prasad, that the plaintiffs, as reversionary heirs of the said Babu, are entitled to get possession of the properties in dispute since the death of Musammat Jainti Kumari, that it is illegal on the part of the defendant not to give up possession of the properties, and that the defendant's possession is quite illegal and wrongful.

(2) That on adjudication of the above points a decree may be passed in favour of the plaintiffs in respect of the properties in dispute by dispossessing the defendant or such person as may be found in possession at the time of delivery of possession.

With their plaint the plaintiffs deposited a court-fee upon a valuation of ten-times the Government revenue treating it as a suit for possession of land under section 7(*v*) of the Indian Court-Fees Act. On appeal to this Court they again paid the fee calculated on the same basis with their memorandum of appeal. The Stamp Reporter whose duty it is to see that the proper fee is attached to the memorandum of appeal reported that the fee payable in such a case was that provided by section 7 (*iv*) (*c*) of the Court-Fees Act which provides for suits to obtain a declaratory decree

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or order where consequential relief is prayed, in which case the stamp fee payable is an *ad valorem* fee according to the amount at which the relief sought is valued in the plaint or memorandum of appeal. If the fee is payable under clause (*iv*) and not under clause (*v*) of the section, the plaint and the memorandum of appeal were both insufficiently stamped by a sum of Rs. 1,025. The question came up before the Taxing Officer who referred it to the Taxing Judge who held that the case fell within section 7, clause (*iv*)(*c*) of the Court-Fees Act and that on the memorandum of appeal the deficit court-fee should be paid. Upon this question his decision as to the fee payable on the memorandum of appeal is final and the deficit has been paid. The question whether the deficit payable on the plaint should be deposited before the appeal should proceed was placed before the Bench for determination. As there appeared to be some conflict of opinion between the decisions in the case of *Kshetra Mohan Mahapatra* v. *Ganesh Lal Pandit* (1) and the case of *Ram Sanehi Tewari* v. *Mahadeo Upadhya* (2), the Division Bench thought that the question should be heard by a special Bench and it now comes before us for determination.

The question is whether the present suit is one to obtain a declaratory decree where consequential relief is prayed under clause (*iv*) (*c*) of section 7, in which case the fee paid on the plaint is deficient by Rs. 1,025, or whether it is a suit for the possession of land under clause (*v*) of that section. A practice appears to have sprung up in the subordinate Courts of this province, and possibly in other provinces, of claiming declarations in cases where such relief is altogether unnecessary. This practice frequently gives rise to questions of some nicety as to what is the proper fee payable in such cases. In cases where such a declaration has been claimed, although it is not

(1) (1921) 6 Pat. L. J. 101.

(2) F. A. No. 242 of 1917. *See* p. 126, footnote (3), *ante*.

necessary in the particular case to enable the plaintiff to obtain possession of property or other relief for which the suit is really brought, it has sometimes been held that if he frames the suit in that way he must pay a court-fee upon a suit so framed. Further, where the plaintiff claims relief to which he is not entitled until some decree or alienation of property which stands in his way has been avoided, or until his legal character or title, which has been called in question, has been declared by a decree of the Court it has generally been held that such a suit comes under clause (*iv*) (*c*) of the section even though the declaration which it is necessary for him to obtain before the further relief can be granted has not been in terms asked for in the plaint. In the present case the plaintiff asks for an adjudication upon certain points and for a decree in his favour for delivery of possession by dispossessing the defendant. He does not in terms ask the Court for any declaration either as to his legal character or title or as to the invalidity of the gift in favour of the defendant. The Court is in all cases bound to adjudicate upon the matters in issue between the parties and it is unnecessary for the plaintiff to pray that this should be done. The real relief which the plaintiff seeks is delivery of possession of the property by dispossession of the defendant, and, if he asks for a decree in those terms when he is not bound first to ask for a declaration before such relief can be granted, I do not think that, merely because he asks the Court to adjudicate upon the matters in issue, the suit should be treated as a suit to obtain a declaratory decree with consequential relief. The real question for determination appears to me to be whether or not the plaintiff can obtain in the present suit a decree for possession without first seeking a declaration that the gift to the defendant by Jainti Kumari is not binding. If a gift in such circumstances is binding as against the reversioner until it is set aside by the decree of the Court then it is, in my opinion, essential that he should first ask for a

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declaration setting it aside. This question appears to me to be governed by the decision of the Judicial Committee in *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi* (1), where it was decided in a suit by a reversioner on the death of a Hindu widow to recover immoveable property of her husband, of which the widow had granted a lease for a term extending beyond her own life, that the reversioner might at his option affirm the alienation or treat it as a nullity without the intervention of any Court, there being nothing to set aside or cancel as a condition precedent to the heir's right to recover the property. In that case the plaintiffs had in fact by their plaint prayed for a declaration that the lease was inoperative as against them and further asked for delivery of possession. It was held, however, that it was not necessary for them to claim a declaration and that they might merely have claimed possession leaving it to the defendants to plead and (if they could) prove the circumstances which they relied on for showing that the lease or any derivative dealings with the property were not in fact voidable but were binding on the reversionary heirs. Their Lordships accordingly held that Article 91 of the Limitation Act which limits to three years the period for bringing a suit to cancel or set aside an instrument was no bar to a suit for possession after the three years had expired.

It follows, therefore, that in the present case there was no necessity for the plaintiff to seek a declaration that the gift was not binding as a necessary preliminary to his right to recover possession, nor did he in fact do so. I can see no reason why the wording of the prayer portion of the claim which asks the Court to consider and adjudicate upon the matters alleged in the plaint and then grant a decree for possession should be interpreted as asking for a declaratory decree. The Court was bound to determine the questions in issue and the plaintiff was not bound to seek a declaration

(1) (1907) I. L. R. 34 Cal. 329; L. R. 34 I. A. 87.

in the form of a decree. The only decree asked for was one for possession after dispossessing the defendant, and the rest of the prayer was merely unnecessary surplusage which, I regret to say, is so often a distinctive feature of the pleadings which come before us.

The cases of *Ugramohan Chaudhry* v. *Lachmi Prasad Choudhry*(1) and *Kshetra Mohan Mahapatra* v. *Ganesh Lal Pandit* (2) were relied upon by the learned Government Advocate who appeared on behalf of the Board of Revenue. In the former case the plaintiffs' claim to recover a large estate depended upon the validity of his adoption which had been distinctly challenged and he brought the suit to establish his status as an adopted son as well as to recover the estate. It was, therefore, held that the suit was one for a declaratory decree with consequential relief. In the second case the plaintiff asked in terms for a declaration that she was the sole heir of her father and that the defendants who claimed under a transfer from her mother when in possession of the estate as a Hindu widow had no right to the properties in suit. Even if such a declaration was not necessary the plaintiff asked for it and it was competent to her to do so. The fee in both cases was held to fall under section 7(*iv*) (*c*) of the Act. These cases, however, do not afford any authority for the proposition that where a declaration is neither necessary nor in terms asked for the suit should be treated as one coming under clause (*iv*) (*c*) of the section.

It was further argued that as the Deputy Collector had refused to enter the plaintiff's name in the register he was bound to seek a declaration of his title. I am unable to follow this argument. The title of the plaintiff in no way depended upon the act of the Deputy Collector nor was anything done by that officer an obstacle which required to be removed before the plaintiff could assert his title and claim possession.

(1) (1920) 5 Pat. L. J. 339. (2) (1921) 6 Pat. L. J. 101.

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In my opinion the fee paid on the plaint was the proper fee and the case came within clause (*v*) and not clause (*iv*) (*c*) of the 7th section of the Court-Fees Act. The plaint was properly stamped and the appeal should be allowed to proceed.

MULLICK, J.—I agree.

JWALA PRASAD, J.—I agree with the order proposed by my Lord the Chief Justice.

COUTTS, J.—I regret I am unable to agree with my Lord the Chief Justice and my learned brothers.

As I read the plaint, the suit is one for a declaratory decree with a consequential relief, and this being so, the court-fee is payable under section 7 (*iv*) (*c*) of the Court-Fees Act. The Court-Fees Act is a purely fiscal act, and in deciding what court-fee is payable on a plaint, the question of whether any relief asked for is necessary or not does not in my opinion arise.

DAS, J.—I agree with the order proposed by my Lord the Chief Justice.

SPECIAL BENCH.

Before Mullick, Coutts and Das, J.J.

KING-EMPEROR

v.

ABDUL HAMID.*

1922.

August, 3.

Police Act, 1861 (*Act V of* 1861) *sections* 30 *and* 30*A*—*Powers granted under—Notification under, nature of—Penal Code*, 1860 (*Act XLV of* 1860), *section* 141, *Second*—*Resistance, meaning of—"law" whether include executive order authorised by statute.*

*Government Appeal No. 4 of 1922, from an order of H. Foster, Esq., Judicial Commissioner of Chota Nagpur, dated the 20th March, 1921, modifying an order of K. C. Ritchie, Esq., Deputy Magistrate of Palamau, dated the 11th February, 1922.