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got into the room except through the ordinary entrance without traces of such entry being noticeable; and there were no such traces I do not, however, think that this suggestion was really put forward by the defence and, indeed, so far as I can ascertain from the record the real suggestion made was that the woman committed suicide. I have already had occasion to state that the medical evidence was not very satisfactory; one thing, however, is quite clear (I have examined the original deposition) and that is that the doctor states in his evidence given before the Judicial Commissioner that the cuts on the throat could have been self-inflicted.

BUCKNILL, J.

Sinister though this case is, and although there lies some ground for suspicion against the appellant, I am bound to say that it does not appear to me that there is sufficient evidence to justify a conviction. The appeal must be allowed, the conviction and sentence set aside and the accused released.

ADAMI, J.—I agree.

Conviction and sentence set aside.

REFERENCE UNDER THE COURT-FEES ACT, 1870.

Before Jwala Prasad, J.

MAHABIR PRASAD

v.

SHYAM BIHARI SINGH.*

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Court-fees Act, 1870 (*Act VII of* 1870), *Schedule I*, *Article 17—suit on mortgage of joint property—personal decree against the defendant—execution resisted by other defendants—Suit for declaration that property is liable in execution and plaintiff entitled to attach and sell judgment-debtor's interest.*

* In the Matter of a Stamp Reference.

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In a suit on a mortgage of joint Hindu family property a decree was passed against defendant no. 1 only, on the ground that no legal necessity for the debt had been established. Execution of the decree was successfully resisted by the other defendants on the ground that defendant no. 1 had no subsisting interest in the joint family properties inasmuch as the properties had been partitioned and defendant no. 1 had sold his share to defendant no. 10 The dtcree-holder thereupon sued for a declaration that the partition and sale to defendant no. 10 were collusive and inoperative and that the family properties were still joint, and for a declaration that the plaintiff was entitled to realize his decree from the joint properties by attachment and sale of the interest of defendant no. 1. It was contended that although the other reliefs were merely declaratory the last-mentioned relief was in the nature of consequential relief. *Held*, that it was unnecessary for the plaintiff to pray for the last-mentioned relief and, therefore, that the suit was intrely one for a declaration, and that the court-fee payable was that prescribed by Article 17, Schedule II of the Court-Fees Act, 1870.

This was a reference to the Taxing Judge to determine the court-fee payable upon the memorandum of appeal.

The plaintiffs were the appellants. The defendant no. 1 had executed a mortgage bond in their favour on the 27th February, 1914, hypothecating the properties of the joint family consisting of defendants nos. 1 to 6. Defendants nos. 1 and 2 were brothers; defendants nos. 3 to 6 were sons of defendant no. 2; defendant no. 7 was the mother of defendants nos. 1 and 2; defendants nos. 8 and 9 were wives of defendants nos. 1 and 2, respectively, and the defendant no. 10 was the father's sister's son of defendants nos. 1 and 2.

On the 18th June, 1918, the plaintiffs commenced an action to enforce the mortgage, impleading defendants nos. 1 to 6 as parties to the suit. The decree was, however, passed only against defendant no 1, upon the ground that no legal necessity for the debt was established. The decree was a personal decree and was dated the 17th of June, 1919. The

plaintiffs levied execution of the decree and sought to sell the right, title and interest of defendant no. 1 in the family properties. The execution was resisted by defendants nos. 3, 7, 8 and 10. The objections of defendants nos. 3, 7 and 8 were founded upon a certain partition decree in suit no. 84 of 1918. That suit was instituted by defendant no. 3 alleging himself to be the adopted son of defendant no. 1. In the partition the shares of the different members of the family in the property were ascertained. Defendants nos. 7, 8 and 9, the mother and wives of defendants nos. 1 and 2, were allotted certain shares in lieu of maintenance under the Hindu Law. Defendant no. 3 also obtained a share out of what was allotted to defendant no. 1 as his adopted son. Thus, the share of defendant no. 1 was considerably diminished. Even this diminished share was disposed of by a sale deed, dated the 30th January, 1919, executed by him and defendant no 2 in favour of defendant no. 10. The aforesaid distribution of the shares in the properties to the different members in the family and to defendant no. 10 was before the plaintiffs' decree was put in execution. Defendant no. 10 put in an objection and the property sold to him was exempted from the sale under Order XXI. rule 58, of the Civil Procedure Code. Similarly, the shares allotted to defendants nos. 3, 7 and 8 were exempted from the liability of the plaintiffs' decree in a proceeding instituted under section 47 of the Civil Procedure Code.

The plaintiffs, therefore, instituted the present suit by presenting their plaint in the Court of the Subordinate Judge of Patna. In the plaint the following reliefs were claimed :

I. It may be adjudicated and declared that the deed of absolute sale, dated the 30th January, 1919, executed by defendants nos. 1 and 2 in favour of defendant no. 10 is altogether a nominal and collusive document without consideration, that it has not at all been made operative up to this time, that defendants nos. 1 to 6 are still in joint possession of the properties covered by the sale deed and that the said sale deed is by no means a genuine document.

II. It may be further adjudicated that the partition suit no. 84 of 1918, filed on behalf of defendant no. 3, was got filed by defendant no. 1,

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that defendant no. 3 is by no means the adopted son of defendant no 1, that the partition has not at all been made operative up to this time, that the entire estate of defendant no. 1 is still joint, and that defendant no. 1 is still in possession thereof jointly with defendants nos. 2 to 6.

III. It may also be adjudicated and declared that defendant no. 1 fraudulently took the aforesaid measures after the decree in favour of the plaintiffs was passed, with a view to diminish his share as also to evade payment of the decretal amount payable to the plaintiffs, and that the plaintiffs are not bound by the same.

IV. On the adjudication of the above points, it may be declared that the plaintiffs are entitled to realize their decree from the estate of defendants nos. 1 to 6 by attachment and sale.

The plaint was filed on a stamp-paper of the value of Rs. 10 under Schedule II, Article 17, of the Court-Fees Act, the suit being treated as a declaratory one. The peripatetic Stamp-Reporter objected to the court-fee paid and reported that the suit was not only for a declaration but for a declaration and consequential relief, and that consequently the court-fee leviable was *ad valorem* under section 7, clause (*4*) (*c*), of the Act. The Subordinate Judge before whom the plaint was presented, however, disagreed with the view of the Stamp-Reporter and held that the court-fee paid was sufficient.

The preliminary issues were disposed of by the Subordinate Judge on the 14th May, 1923, and the other issues were disposed of on the 11th June, 1923. As a result of the final decision of the Subordinate Judge the plaintiffs' suit was decreed as against defendant no. 1 and dismissed as regards defendants nos. 2 to 6 and 8 to 10.

The plaintiff filed an appeal before the District Judge of Patna upon the ground that the suit was valued at Rs. 2,100 only. The District Judge held that the court-fee paid was insufficient and that an *ad valorem* fee was payable. He accordingly ordered the plaintiffs to value the property, to pay court-fee upon the subject-matter of the suit and to make up the deficiency within a certain time. Assessing the value upon the principle laid down by the District Judge, the plaintiffs valued the appeal at Rs. 5,100,

which made the appeal incompetent in the Court of the District Judge and entertainable only by the High Court. Accordingly, the memorandum of appeal was taken back from the Court of the District Judge, and was presented to the High Court.

Siveshwar Dayal, for the appellant: The only point to be decided is whether, on the facts admitted, the relief principally sought in paragraph 4 of the plaint (for attachment and sale of the property) is a necessary relief for which I must pay. I have already paid an *ad valorem* court-fee on the decree in the mortgage suit. In the execution case a question arose with regard to the extent of the share of the judgment-debtor. I brought the present suit for a declaration that the partition-decree and the sale-deed were fraudulent and collusive and that the judgment-debtor's share in the property was not diminished by reason of the decree and the sale-deed. Relief no. 4 is, therefore, a surplusage, because in case the other reliefs, which are conceded to be declaratory, are granted, relief no. 4 will become useless. The only point to be considered is whether this last relief, which is only a surplusage, will change the character of the suit in any way. In *Bibi Phul Kumari* v. *Ghanshyam Misra*(1), although a permanent injunction was sought for, their Lordships held that the suit was in effect a declaratory one. In that case a permanent injunction was a necessary result following from the declaratory reliefs. In my case, too, the disputed relief is only a natural consequence which automatically follows from the other reliefs. In *Aisa Siddika* v. *Bidhu Sekhar Banerjee*(2) their Lordships have laid down the principle as to what reliefs constitute necessary consequential reliefs. I rely on *Ganeshi Lal* v. *Beni Pershad* (3). The Crown's main contention is that because I pray for the attachment and sale of the property I should pay

(1) (1908) I. L. R. 35 Cal. 202; L. R. 35 I. A. 22.

(2) (1913) 17 Cal. L. J. 30.

(3) (1911) 9 Ind. Cas. 673.

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an *ad valorem* court-fee, but my answer to that will be that the attachment and sale will not be effected in pursuance of any order of this court but in pursuance of the decree obtained by me in the court below where I have already paid an *ad valorem* court-fee. The Stamp Reporter relies on a case falling under Order XXI, rule 63. But Schedule II, Article 17, comprises many subsections which cover my case as well as a case under Order XXI, rule 63. *Harihar Prasad Singh* v. *Shyam Lal Singh*(1) is distinguishable. It deals with a case brought by the defendants, whereas the present case is by the plaintiffs. We have already paid court-fee on the value of our claim and cannot be made liable to pay *ad valorem* court-fee over again for every small matter. Moreover in that case the decree had been passed against the plaintiff who wanted to avoid it, whereas in the present case we want to avoid a partition-decree to which we are not parties. As, in *Harihar Prasad Singh* v. *Shyam Lal Singh*(1) the plaintiff was a party to the decree, he could not pray for a declaration that it was invalid and inoperative without first praying for the setting aside of the decree. The test is whether the relief is a necessary relief for which the plaintiff must pay. The decision in *Aisa Siddika* v. *Bidhu Sekhar Banerjee*(2), where there is a distinction drawn between persons who are parties to a decree and those that are not parties thereto, reconciles *Harihar Prasad Singh* v. *Shyam Lal Singh*(1) with the present case. I submit, however, that there is a conflict of decision on this point inasmuch as *Zinnatunnessa* v. *Girindra Nath Mukherjee*(3) and *Shrimant Sarajirao Khanderav Naik Nimbalkar* v. *S. Smith*(4) have been dissented from in *Harihar Prasad Singh* v. *Shyam Lal Singh* (1).

Lachmi Narayan Singh, Government Pleader, for the Crown: Under section 7(*iv*)(*c*), Court-Fees Act, the plaintiff is bound to pay an *ad valorem* fee where a consequential relief is prayed for. Though the

(1) (1913) I. L. R. 40 Cal. 615.
(2) (1913) 17 Cal. L. J. 30.
(3) (1903) I. L. R. 30 Cal. 788.
(4) (1896) I. L. R. 20 Bom. 736

prayer be cast in a declaratory form, the Courts nevertheless have to be strict in seeing whether the plaint is drafted in a way so as to defeat the provision of a fiscal law. The first three prayers are no doubt for a declaration only, but the last prayer is clearly for the attachment and sale of the share of the judgment-debtor. In *Harihar Prasad Singh* v. *Shyam Lal Singh* (1) their Lordships observe : " The correct value of the suit is the value of the amount of the decree. If that value is put on for the purposes of court-fee, it must also be put on for the purpose of jurisdiction." I submit, therefore, that the last prayer cannot be surplusage but is in fact a consequential relief for which the plaintiff must pay an *ad valorem* court-fee.

S. A. K.

JWALA PRASAD, J. (after stating the facts as set out above, proceeded as follows) :—

The Stamp Reporter is of opinion that the court-fee payable is *ad valorem* under section 7, clause (*4*) (*c*). The Taxing Officer, however, is doubtful as to the view taken by the Stamp-Reporter and seems to be inclined to take the view that the court-fee paid is sufficient, treating the reliefs as being only declaratory.

It is remarkable that the Taxing Officer was the District Judge at the time when the memorandum of appeal was presented in the District Court and at that time he was of opinion that *ad valorem* court-fee was leviable. He says that upon further consideration and upon the law having been placed before him he has now changed his opinion.

The decision of the question depends upon the scope of the plaintiff's suit and the reliefs claimed by them. The plaintiffs want to have it declared that the properties in suit belong to defendant no. 1 and that the other defendants have no interest therein. Accordingly, they pray for reliefs nos. 1, 2 and 3. On

(1) (1913) I. L. R. 40 Cal. 615 (618).

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account of the circumstances disclosed in the execution proceedings, the plaintiffs had to set forth those circumstances in their plaint and also in the reliefs. Those are the circumstances upon which defendants nos. 3, 7, 8 and 10 base their claim to the property; but the reiteration of those facts and circumstances in the reliefs do not alter the real nature and scope of the reliefs. The plaintiffs will be entitled to proceed against the properties in execution of their decree against defendant no. 1 only when defendant no. 1 has a subsisting interest therein and the other defendants have no interest. It is conceded by the Stamp Reporter as well as the learned Government Pleader that reliefs nos. 1 to 3 are merely declaratory. It is, however, contended that relief no. 4 is in the nature of consequential relief. The plaintiffs want it to be declared that they are entitled to realize their dues from the estate of defendants nos. 1 to 6 by attachment and sale of the interest of defendant no. 1 only. It was conceded before the Subordinate Judge that the plaintiffs have no right in execution of the personal decree against defendant no. 1 to proceed against the shares of defendants nos. 2 to 6 and that the relief is merely directed against defendant no. 1 only. I will quote from the decision of the learned Subordinate Judge on this point :—

> "The prayer no 4, as it is worded, means that the plaintiff wants to proceed against the estate of all the defendants jointly, as he does not say there that he may be declared to be entitled to proceed against the right, title and interest of defendant no. 1 only in the joint estate. He cannot proceed against the shares of defendants 2 to 6. The learned Pleader for the plaintiff, however, states that this prayer means he wants to proceed against the right, title and interest of defendant no. 1 only. Taking this to be so, let us see if he can bring into hotchpot the properties which have been released in favour of defendant no. 10 or allowed in favour of defendants 3 to 6."

Therefore that relief was confined in the Court below against defendant no. 1 only. A number of authorities have been cited on both sides. It is not necessary to refer to all of them. The following only may be cited : *Kesavarapu Ramakrishna Reddi* v. *Kotta Kota*

Reddi (1), *Harihar Prasad Singh* v. *Shyam Lal Singh* (2), *Bibi Phul Kumari* v. *Ghanshyam Misra* (3), *Dhondo Sakharam Kulkarni* v. *Govind Babaji Kulkarni* (4), *Aisa Siddika* v. *Bidhu Sekhar Banerjee* (5), *Ganeshi Lal* v. *Beni Pershad* (6) and *Zinnatunnessa* v. *Girindra Nath Mukherjee* (7).

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The other cases have all been referred to in these cases. I have gone through the cases very carefully and I am of opinion that the principle laid down in *Harihar Prasad Singh* v. *Shyama Lal Singh* (2) would not apply to the present case. In that case the plaintiff prayed for a declaration—(*1*) that a decree amounting to Rs. 2,794 and odd should be declared forged, illusory and unfit for execution; and (*2*) that the family property valued at Rs. 7,000 was not liable to be sold in execution of the decree. It is conceded by the Stamp Reporter that this is a converse case to the present one. In the present case the plaintiff has obtained a decree against the defendant no. 1 on payment of full court-fee and he would be entitled to sell the property if the defendant no. 1 has got any right, title or interest therein. He need not in the present case seek any further relief such as has been claimed by him in relief no. 4 for a declaration that

"they are entitled to realize their decree from the estate of defendants nos. 1 to 6 by attachment and sale."

In the case of *Zinnatunnessa* v. *Girindra Nath Mukherjee* (7), it was considered sufficient that a suit in which the only prayer was to have it declared that a certain decree is ineffectual and inoperative against the plaintiff was held to be a sufficient prayer to give the plaintiff relief and the plaintiff need not have prayed for a consequential relief.

The case of *Ganeshi Lal* v. *Beni Pershad* (6) has reviewed all the authorities on the subject. It would

(1) (1907) I. L. R. 30 Mad. 96.
(2) (1913) I. L. R. 40 Cal. 615.
(3) (1908) I. L. R. 35 Cal. 202: L. R. 35 I. A. 22.
(4) (1885) I. L. R. 9 Bom. 20.
(5) (1913) 17 Cal. L. J. 30.
(6) (1911) 9 Ind. Cas. 673.
(7) (1903) I. L. R. 30 Cal. 782.

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seem that consequential relief can be insisted upon when the plaintiff will not get any redress by having merely a declaratory decree; for instance, when the property is in possession of the defendant, the plaintiff will not be allowed to seek merely a declaration of his title but must pray for recovery of possession as a consequential relief, and where a mere declaration is sufficient to give the plaintiff full relief a further declaration will be deemed to be redundant; and the fact that the plaintiff asked for a redundant relief will not alter the nature and scope of the suit and would make the suit one for a declaration with consequential relief. The present is a case where relief no. 4 in the plaint is a mere surplusage, for upon the declarations made under reliefs 1 to 3 the plaintiffs would be entitled to attach and sell the right, title and interest of defendant no. 1 in the property in suit. On the other hand, the granting of relief no. 4 will not at all improve the position of the plaintiffs for they would not be entitled to get the property unless defendant no. 1 has interest therein. The decision of their Lordships in the case of *Bibi Phul Kumari* v. *Ghanshyam Misra*(1) is instructive.

I would, therefore, hold that the relief should be treated only as a declaratory and the court-fee should be charged under Schedule II, Article 17, of the Court-Fees Act.

REVISIONAL CRIMINAL.

Before Adami and Bucknill, J. J.

1924.

April, 4.

HUSSAIN BUKSH MIAN

v.

KING-EMPEROR.*

Penal Code, 1860 (Act XLV of 1860)—sections 379 and 429—theft of an animal—animal subsequently killed by thief—

* Criminal Revision no. 154 of 1924, from a decision of Ananta Nath Mitter, Esq., Sessions Judge of Saran, dated the 28th January, 1924.

(1) (1908) I. L. R. 35 Cal. 202: L. R. 35 I. A. 22.