

mensem for each minor. The petitioner's salary is Rs. 220 per mensem. The maintenance may be reduced to Rs. 15 per month for each child for the present. The Magistrate's order will be varied accordingly.

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 v.
 MA ON KIN.
 DARWOOD,
 J.

APPELLATE CIVIL.

Before Mr. Justice Heald.

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v.

O.A.O.K.R.M. FIRM.*

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 Aug. 18.

Specific Relief Act (I of 1877), s. 42—Declaratory suit without consequential relief—Bare declaratory suit under O. 21, r. 63 of the Civil Procedure Code (Act V of 1908) when permissible.

Held, that a person is bound to make a claim or objection under O. 21, R. 58 if he desires to sue for a bare declaration under O. 21, R. 63 of the Civil Procedure Code and that, although the provisions of O. 21, R. 63 would not debar him, in case he failed to make a claim or objection under O. 21, R. 58, from suing for any relief to which he might be entitled, his suit, if it was a suit for a bare declaration, would be barred by the proviso to section 42 of the Specific Relief Act if he was able to seek further relief than a mere declaration and omitted to do so.

Chan Tat Thai v. Ma Lat, Civil 2nd Ap. 126 of 1915, Ch.Ct.; *Krishnam Sooraya v. Pathna Bee*, 29 Mad. 151; *K.R.M.A. v. Po Thein*, 4 Ran. 22; *Ragunath Mukund v. Sarosh Kama*, 23 Bom. 266; *Societa Coloniale Italiana v. Shree Le*, 4 L.B.R. 252; *Wamanrao Damodar v. Rustomji Edalji*, 21 Bom. 701—*distinguished*.

U Pu—for Applicants.

HEALD, J.—The facts of this case are set out in my judgment in Civil Second Appeal No. 493 of 1926 of this Court. In that judgment I said in effect that because the present applicants had not applied for removal of the attachment, when the property which they claimed was attached, they were not entitled to institute a suit under the provisions

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of Order 21, Rule 63 in respect of that property and that because they were not in possession of the property and would be entitled to possession of it or of part of it in case they established the claim which they desired to make, they were barred by the proviso to section 42 of the Specific Relief Act from suing for a bare declaration of their title or interest in the property.

Applicants ask me to review my finding on that point. Their learned advocate contends now, as he contended at the hearing of the appeal, that a suit lies under Order 21, Rule 63, even if there is no application for removal of the attachment and that the applicants' suit was brought under the provisions of that Rule.

In support of his contentions he has now cited a number of cases, some of which were not cited at the hearing of the appeal.

The earliest of the cases cited is that of *Wamanrao Damodar v. Rustomji Edalji* (1). In that case the mortgagee of certain properties obtained a decree for the sale of the properties. After the decree was made, but before the sale or proclamation of sale, the mortgagor's brothers claimed that the mortgaged properties were owned by them and the mortgagor jointly. The Court ordered that their claim should be notified in the proclamation for sale. The mortgagee then filed a suit against them for a declaration that his mortgagor was sole owner of the properties. The question arose whether such a suit lay under section 42 of the Specific Relief Act and the Court held that it did lie. That case is clearly no authority for the contention that a suit such as the present lies either under Order 21, Rule 63, or under

(1) (1896) 21 Bom. 701.

section 42 of the Specific Relief Act, since there was in it no question of the application of Order 21, Rule 63, or the corresponding provisions of the earlier Code of Civil Procedure and it does not appear that the mortgagee was able to seek further relief than a mere declaration of title against the defendants, so that the proviso to section 42 would be no bar to his suit under the Specific Relief Act.

In the case of *Ragunath Mukund v. Sarosh Kama* (1), a number of creditors obtained decrees against different persons, each of whom was alleged to be owner of a certain mill, and in execution of their decrees each of them attached the mill as belonging to his judgment-debtor. Ragunath applied for removal of one of the attachments but his application was dismissed. He then filed a suit under section 283 (now Order 21, Rule 63) of the Code, not merely against the creditor whose attachment he had opposed, but against all the creditors who had attached the property. It was contended that under section 283 he could sue only the creditor whose attachment he had opposed but it was held that the summary remedy given by section 278 (now Order 21, Rule 58) of the Civil Procedure Code to a person whose property has been wrongfully attached is alternative with the more elaborate one by way of suit, which he if so minded may adopt, and that the object of the section is not to deprive a claimant of his remedy by suit but to give him, if he is diligent, a more speedy and summary remedy. This may be true, but if the claimant prefers the remedy by suit his suit will be subject to the limitations imposed by law on such suits, and if it is a suit for a bare declaration it may be barred by the proviso to section 42 of the Specific Relief Act.

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The next case is that of *Krishnam Sooraya v. Pathma Bee* (1), where it was held that the proviso to section 42 of the Specific Relief Act does not operate so as to take away from a party against whom an order has been made under section 280, 281 or 282 (now Order 21, Rule 60, 61, 62) of the Code the special right conferred by section 283 (now Order 21, Rule 63) to sue for a declaration of his title so far as it is affected by the order which he seeks to impeach. It is clear that that case cannot be regarded as an authority on the questions which arise in the present case since in this case it is admitted that there was no order made under Order 21, Rule 60.

Applicants' learned advocate has mentioned also the case of *The Societa Coloniale Italiana v. Shwe Le* (2). In that case the decree-holders attached certain property and the defendants in the suit applied for removal of the attachment. While that application was pending, the decree-holders filed a suit for a declaration that the property belonged to their judgment-debtor. The decision was in these words "It is admitted now that Chapter VI of the Specific Relief Act does not apply to the case . . . but I think there is no doubt that plaintiffs have a right of suit quite independent of section 283, Civil Procedure Code. That a person who claims to be the owner of attached property has such a right was laid down in *Ragunath Mukund v. Sarosh Kama* and there is no reason why the decree-holder should not have a like right of suit provided he has attached the property and his right to attach it has been disputed." The facts of that case differ from those of the present case in that in the present case there has been no

(1) (1905) 29 Mad. 151.

(2) (1909) 4 L.B.R. 252.

application for removal of the attachment, and it may be mentioned that a Bench of this Court has already expressed dissent from the view taken in that case that independently of section 42 of Specific Relief Act and of the provisions of Order 21, Rule 63, a decree-holder who has attached property and whose right to attach has been disputed has a right to sue for a bare declaration of his judgment-debtor's title.

The decision in the case cited above was mentioned by a single Judge of the Chief Court in the case of *Chan Tat Thai v. Ma Lat* (1), which was not officially reported but to which the applicants' learned advocate has referred. In that case a decree-holder had attached certain property in execution of his decree but had subsequently withdrawn the attachment, and the learned Judge said that although he was not entitled to sue under Order 21, Rule 63, for a declaration of his judgment-debtor's title to the property, he was nevertheless entitled to sue for such a declaration under the Specific Relief Act. This may or may not be correct, but even if it is correct it is clear that if the plaintiff sues under the Specific Relief Act his suit will be subject to the limitations imposed by that Act and one of those limitations is contained in the proviso to section 42.

The last case to which the learned advocate has referred is the case of *K.R.M.A. v. Po Thein* (2). In that case there was no attachment but the decree-holders sued for a declaration of their right to attach certain properties in execution of their decree and was held that such a suit did not come within the purview of section 42 of the Specifics Relief Act. It may be noted that that is the case referred to

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above, in which doubts were cast on the correctness of the decisions in the cases of *The Societa Coloniale Italiana v. Shwe Le* and of *Chan Tat Thai v. Ma Lat*. It is clearly no authority for the proposition that such a suit as the present falls within the provisions of Order 21, Rule 63, or that if it is a suit under section 42 of the Specific Relief Act it would not be barred by the proviso to that section.

I am still of opinion that applicants were bound to make a claim or objection under Order 21, Rule 58 if they desired to sue for a bare declaration under Order 21, Rule 63, and that although the provisions of Order 21, Rule 63, would not debar them, in case they failed to make a claim or objection under Order 21, Rule 58, from suing for any relief to which they might be entitled, their suit, if it was a suit for a bare declaration, would be barred by the proviso to section 42 of the Specific Relief Act if they were able to seek further relief than a mere declaration and omitted to do so. In the judgment which is under review I held that they were entitled to claim further relief and as they omitted to do so, their suit was in my opinion rightly dismissed as being barred by that proviso.

The present application is in effect an application for the rehearing of the appeal on a point of law on the ground that that point was not fully argued. I do not think that that is a good ground for review and as I am not satisfied that there was any ground for review within the meaning of Order 47, Rule 1, I reject the application.