

ORIGINAL CIVIL.

Before Mr. Justice Chari.

MOHAMMED ABDUL KADER

v.

FINLAY, FLEMING & CO.*

1928

Feb. 1.

Specific Relief Act (I of 1887), s. 42—Declaratory relief strictly a creation of statute—Nature of proprietary right—Negative declaration—Discretionary nature of remedy—Party not to be restricted in the choice of remedies open to him.

Plaintiff sued the defendants for a declaration that he was entitled to use and import in Burma check *longyis* with the Crown or "Taj" mark attached thereto, and that that mark did not constitute an infringement of the defendants' Fez or "Topee" mark. Previous to the institution of this suit, defendants had filed a complaint in respect of the trade-mark, against the plaintiff in a Criminal Court, which was pending.

Held, that the Court has jurisdiction to grant a declaratory relief only in cases which conform strictly with the provisions of s. 42 of the Specific Relief Act. The right to property referred to in the section is a person's individual right in a particular property and not a general right which he possesses in common with other persons. Plaintiff did not require a declaration for selling any kind of goods he liked. He was not complaining of any infringement of his own trade-mark; but wanted a negative declaration that he was not infringing some other person's trade-mark. S. 42 of the Act was not intended for such a purpose. Even if such a suit lies the remedy was discretionary and the Court would refuse it as the object of the plaintiff was to prevent the defendants from pursuing according to their choice their criminal remedy.

Dokali v. Kadernath, 39 Cal. 704; *K.R.M.A. firm v. Manung Po Thein* 4 Ran. 22—*referred to*.

Patker for the plaintiff.

McDonnell for the defendants.

CHARI, J.—The plaintiff files this suit for a declaration that he is entitled to use and import in Burma check *longyis* with the Crown or "Taj" mark attached thereto, and that that mark does not constitute an infringement of the defendants' Fez or "Topee" mark.

1928

MOHAMMED
ABDUL
KADER
v.
FINLAY,
FLEMING &
Co.

CHARI, J.

The case has come up before me for decision on a preliminary point whether the present suit for a declaration lies, and whether the Court should not, in the exercise of its discretion, refuse to grant the declaration asked for.

It is admitted that the defendant filed a complaint against the plaintiff in the Magistrate's Court on the 10th November, 1927, in respect of the alleged infringement of his trade-mark. After appearance by the accused before the Magistrate, the plaintiff on the 14th of November, 1927, filed the present suit for a declaration as stated above.

It is contended by the defendants in this suit, Messrs. Finlay, & Fleming Company, that the object of the filing of this suit was to get an adjudication on the matters already before the Magistrate; that a decision of this Court cannot be binding on the Magistrate, who is bound to proceed with the criminal case and come to an independent finding on the guilt of the accused; and that the declaration sought would, therefore, be useless for the purpose for which it is asked.

The plaintiff does not in his plaint in the present suit say a word about the criminal complaint. There can be no doubt, however, that his object is to get an adjudication in this Court on the point involved in the complaint. There is nothing wrong in his anxiety to get an adjudication from this Court, which, though it may not be binding on him, would carry great weight with the Magistrate. The authorities cited by the learned advocate for the defendants are:—(i) Indian Law Reports, XLVIII Allahabad, 88 and (ii) Indian Law Reports, XLVII Allahabad, 904.

They were cited as supporting the proposition that a Civil Court should not grant a declaration in

respect of a matter which is actually before another Court and over which that Court has jurisdiction, but they are cases in which the other Court was a specially constituted tribunal having exclusive jurisdiction of the matter. These rulings were not intended to lay down any principle of general application.

1928
MOHAMMED
ABDUL
KADER
v.
FINLAY,
FLEMING &
Co.
CHARI, J.

The very object of a declaratory suit is to enable the decree in that suit to be used in future litigation between the parties in the same or another Court. It is for this reason that a plaintiff is enabled by a special provision of the Statute to obtain a decree which by its nature is inexecutable.

The learned advocate also cites a case reported in Indian Law Reports, XXIII Calcutta, page 610, as an authority that the decision of this Court will not bind the Criminal Court. The learned advocate for the plaintiff contends that whether this is so or not is immaterial, as, if the plaintiff is entitled to the remedy he seeks, and if he properly moves a Court having jurisdiction, the pendency of a criminal case is no ground for refusing him the relief to which he is in law entitled.

The fact that the learned Magistrate thought fit to stay proceedings in the criminal case pending the civil case is an entirely accidental circumstance. It is a matter entirely within his discretion, and he exercised that discretion, and in my opinion rightly, by staying proceedings in his own Court pending the decision of this Court.

Thus, though the contention as put forward by the learned advocate for the defendants is capable of refutation in the manner above indicated, the underlying idea, if applied in another way, does furnish a strong argument in favour of the defendants.

1928
 MOHAMMED
 ABDUL
 KADER
 &
 FINLAY
 FLEMING
 & Co.
 CHARI, J.

Before dealing with this point, I shall first consider whether a suit for the declaratory reliefs claimed does lie. It has been held by Sir Benjamin Heald and myself in *K.K.M.A. firm v. Maung Po Thein* (1), that relief by way of a declaratory decree is a creation of Statute. The Court has jurisdiction to grant that relief only in cases which conform strictly with the provisions of section 42 of the Specific Relief Act. In my opinion the Court has no inherent jurisdiction to grant any kind of a declaratory relief

Section 42 of the Specific Relief Act enacts that any person entitled to a legal character or right to property may institute a suit against any person denying or interested to deny his title to such character or right. No statutory provision is more liable to abuse than section 42 of the Specific Relief Act. Attempts are so constantly made to induce the Courts to apply that section for purposes for which it was never intended that the note of warning sounded by Sir Lawrence Jenkins in the case of *Deokali v. Kedarnath* (2), is not uncalled for and should always be borne in mind by Courts in granting relief under that section.

The Court in which a declaratory suit is filed must not be misled by mere forms, but must look through the form at the real substance of the plaintiff's claim and, after careful scrutiny, must satisfy itself that the reliefs claimed are such as are contemplated and provided for by section 42 of the Act.

In the Calcutta case the learned Judge analysed the reliefs sought and showed how they did not conform with the provisions of section 42, and an analysis of the reliefs sought in this case leads to a similar result. These reliefs do not obviously affect any legal character of the plaintiff, and the plaintiff

(1) (1926) 4 Ran. 22.

(2) (1912) 39 Cal. 704.

cannot maintain his suit unless they are concerned with some right of his to property. The right to property referred to in section 42 is the plaintiff's individual right in a particular property and not a general right which he possesses in common with all or some of his fellow citizens.

The plaintiff in this suit asks first that he is entitled to use and import in Burma check *longyi* with the picture of a Crown or "Taj" mark. He does not base this claim on any individual right of his. He is, of course, entitled to import any kind of goods and sell the same so long as he does not infringe the rights of others. No declaration is necessary for this purpose, and a declaration of this kind is of the same character as if a person moves a Court for a declaration that he is entitled to walk on the footpath.

The second prayer is one to the effect that the plaintiff's "Crown" or "Taj" mark does not constitute an infringement on the defendants' "Topee" or "Fez" mark.

Now, what is the meaning of this relief and what does the plaintiff really want? He does not complain of any infringement of his trade-mark but wants a declaration that he, (the plaintiff), is not infringing on the trade-mark of some other person, (the defendants). The plaintiff, in effect, asks for a declaration that in any suit the defendants may file, they (the defendants) are not entitled to succeed. It is as if a person, without claiming any right himself, seeks a declaration that he is not committing trespass on the land of someone else. Section 42 was not intended for such a purpose.

I am, therefore, of opinion that the reliefs sought by the plaintiff are not reliefs contemplated by section 42 of the Specific Relief Act, and that, therefore, the suit does not lie.

1928

MOHAMMED
ABDUL
KADER
vs.
FINLAY
FLEMING
& CO.
CHARL. J.

1928

MOHAMMED
 ABDUL
 KADER
 v.
 FINLAY
 FLEMING
 & Co.
 CHART, J.

Turning now to the argument of the learned advocate for the defendants, should the Court in this case grant a declaratory relief? The grant of such a relief is in the discretion of the Court and, even if a suit did lie, the Court may, for good reasons, refuse to grant relief. In my opinion this is a case in which the Court, in the exercise of its discretion, should refuse to enquire into the allegations of the plaintiff. My reasons are as follows:—

It is for the person whose trade-mark is infringed to complain of the infringement. Such a person has two remedies open to him. He can file a complaint in a Criminal Court, or he can get an injunction from a Civil Court. He may choose the former remedy as being the more expeditious. Whatever his reasons may be, the choice is entirely his, and it is not for the person who is alleged to have infringed on his rights to dictate to the owner or proprietor of the trade-mark what remedy he shall seek. In the case of a private prosecution in which a civil or *quasi*-civil right is involved, a Magistrate, naturally and properly is bound to stay his hand still a civil suit in which the same right is in question is adjudicated upon. The judgment of the Civil Court, whether binding or not, can always be tendered in evidence in the criminal case. The result of entertaining a suit of this description in which an extraordinary negative declaration is sought will be to render the provisions of the Indian Penal Code nugatory and prevent the owners of trade-marks from seeking relief in any but a Civil Court. When the aggrieved party files a complaint before a Magistrate his opponent, by the simple expedient of a declaratory suit and at the trifling expense of ten rupees, can drag him out of the Criminal Court to the Civil Court. If an injured person has a choice of remedies

or tribunals, Courts of law never interfere in his choice, except in very special cases and for the most cogent reason. It stands to reason that they cannot lend countenance to legal subterfuges by which his opponent tries to interfere with that choice.

For these reasons I hold that the suit for the declaratory reliefs claimed does not lie, and that even if it did, the Court, in the exercise of its discretion, should refuse to grant such reliefs.

I, therefore, dismiss the plaintiff's suit with costs, advocate's fee five gold mohurs.

1923

MOHAMMED
ABDUL
KADER
v.
FINLAY,
FLEMING
& CO.
—
CHARI, J.

APPELLATE CIVIL.

Before Sir Guy Ruddle, Kt., K.C., Chief Justice, and Mr. Justice Brown.

T. C. BOSE

v.

OBEDUR RAHMAN CHOWDHURY.*

1928

Feb. 6

Limitation Act (IX of 1908), Sch. I, Arts. 59, 132.—On-demand loan secured by mortgage, time runs from date of loan—Purchaser from mortgagor not made a party by mortgagee in his suit, effect of—Rights of auction-purchaser no higher than mortgagee's—Conflict between auction-purchaser and purchaser from mortgagor—Remedy of auction-purchaser.

Respondent was the purchaser at a Court auction of property which was sold in execution of a mortgage decree on a simple mortgage, the money being repayable on demand. The mortgagee had made only the mortgagors parties in his suit and had omitted to join the appellant who had purchased the property from the mortgagors subject to the mortgage. The executing Court put the respondent as auction-purchaser in possession of the property. Appellant filed a suit against the respondent for recovery of his possession and succeeded in the trial Court as well as in the appeal to the High Court which held that as the mortgage decree was inoperative against the appellant, he could not be disturbed in his possession. He had a right to redeem the property if he chose, but this right was not a liability which he could be compelled to discharge. Some six years after the auction and more than 12 years from the date of the mortgage, respondent filed a suit against the appellant for redemption of the mortgage by the appellant or in default for

* Special Civil Second Appeal No. 293 of 1927.