APPELLATE CIVIL.

Before Mr. Justice Fforde and Mr. Justice Campbell.

HAKIM RAI AND ANOTHER (PLAINTIFFS) Appellants

versus

ISHAR DAS-GORKH RAI AND OTHERS (DEFENDANTS) Respondents.

1927

Feb. 3.

Civil Appeal No. 2849 of 1925.

Court Fees Act, VII of 1870, section 7 (iv) (c)—whether applicable to a suit in which the actual prayer is for a declaration only *that a decree is void*—ad valorem *Court-fee.*

The Plaintiffs sued for a declaration that a decree for Rs. 29,101-15-9 obtained by the defendants against the plaintiffs was based on fraud and was not enforceable and they paid a Court-fee of Rs. 10 and valued their suit for purposes of jurisdiction at the amount of the decree.

Held, that the substance and not the language of the plaint is to be looked at and that the suit must be deemed to be a declaratory suit in which consequential relief is prayed, and therefore requires *ad valorem* Court-fee under section 7 (*iv*) (*c*) of the Court Fees Act.

Arunachalam Chetty v. *Rangasawmy Pillai* (1) and *Deokali Koer* v. *Kedar Nath* (2), followed.

Shrimant Sagajirao v. *Smith* (3), and *Zinnatunnessa Khatun* v. *Girindra Nath Mukerjee* (4), not followed.

Bua Ditta v. *Ladha Mal* (5), and *Ramanadhan Chettiar* v. *Annamalai Chetty* (6), referred to.

First appeal from the orders of Shahzada *Sultan Asad Jan, Senior Subordinate Judge, Gujranwala, dated the 27th August 1925/5th October 1925, ordering that plaintiffs should make up the deficiency in Court-fee before the 5th October 1925 and rejecting the plaint for not making up the deficiency of Court-fee on the said date.*

(1) (1914) I. L. R. 38 Mad. 922 (F.B.)
(2) (1912) I. L. R. 39 Cal. 704.
(3) (1895) I. L. R. 20 Bom. 736.
(4) (1903) I. L. R. 30 Cal. 788.
(5) (1919) 54 I. C. 833.
(6) (1915) 29 I. C. 132.

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v.
ISHAR DAS-GORKH RAI.

CAMPBELL J.

M. L. PURI, for Appellants.

MOTI SAGAR and RAI KESHORE, for Respondents.

JUDGMENT.

CAMPBELL J.—The appellants presented a plaint in the Court of the Senior Subordinate Judge, Gujranwala, in which the prayer was as follows:—That a decree be passed in favour of the plaintiffs against defendants 1 and 2 declaring that the decree, dated the 6th March 1924, for Rs. 29,101-15-9 obtained by them against the plaintiffs from the Bombay Court is based on fraud and deception and is not enforceable.

On this plaint the plaintiffs paid a Court-fee stamp of Rs. 10 as provided for in Article 17 (*iii*) of the Court Fees Act, which prescribes that fee for a suit to obtain a declaratory decree where no consequential relief is prayed. The Court, on objection being taken to the court-fee, ruled that the suit was not a mere declaratory suit but a declaratory suit with consequential relief which should be stamped in accordance with section 7 (*iv*) (*c*) of the Act *ad valorem* on the amount at which the plaintiffs valued the relief sought. The Court further held that since the plaintiffs had valued the suit for purposes of jurisdiction at Rs. 29,101-15-9, they could not declare a different valuation for purposes of Court-fee. The Court gave the plaintiffs time from 27th August 1925 till the 5th October 1925 to make up the deficiency in Court-fee. On the 5th October no additional Court-fee was paid and the plaint was rejected. The plaintiffs have appealed to this Court.

The question for our decision is whether the suit falls under section 7 (*iv*) (*c*) or under Article 17 (*iii*) of the Court Fees Act. The appellants rely upon *Shrimant Sagajirao Khanderav Naik Nimbalkar* v.

Smith (1), where it was held that when the only prayer in the suit is to have a decree set aside as null and void it is a suit for a declaratory decree without consequential relief and that Article 17 (*iii*) is applicable. The view of the Judges was, apparently, that the Court must take what the plaint says and must not go beyond it, and that it is not concerned with the question whether a mere declaration that a decree is void will have any practical effect. This decision was followed in *Zinnatunnessa Khatun* v. *Girindra Nath Mukerjee* (2), where it was observed that the safest course in these cases is to ascertain what the plaintiff actually asks for by his plaint, and not to speculate upon what may be the ulterior effect of his success.

A different view altogether has been adopted by a Full Bench of the Madras High Court in *Arunachalam Chetty* v. *Rangasawmy Pillai* (3). The question referred was whether a suit for a declaration that an instrument of mortgage or sale executed by the plaintiff or a decree that has been passed against the plaintiff for a debt is not binding on him, is a declaratory suit only, or whether it is a suit with consequential relief falling under section 7 (*iv*) (*c*) of the Court Fees Act. The Court held that the substance and not the language of the plaint is to be looked to, and that a suit of the nature described in the reference which merely asks for a declaration is none the less a suit for a declaratory decree with consequential relief within the meaning of section 7 (*iv*) (*c*). This conclusion was arrived at after considering a number of previous authorities which are set forth in the judgment.

(1) (1895) I. L. R. 20 Bom. 736. (2) (1903) I. L. R. 30 Cal. 788.
(3) (1914) I. L. R. 38 Mad. 922 (F. B.).

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In a *later* case *Deokali Koer* v. *Kedar Nath* (1), the Calcutta Court appears to have taken a view which is inconsistent with that taken in the former Calcutta case *Zinnatunnessa Khatun* v. *Girindra Nath Mukerjee* (2). The report shows that that case was cited at the Bar, but it is not mentioned in the judgment. The suit was for a declaration that a registered deed was invalid, and that the decree passed on the basis of it was also invalid and the lower Court had dismissed it on the ground that a Court-fee of Rs. 10 paid on the plaint was insufficient. A preliminary objection was raised that the same fee paid on the memorandum of appeal was also insufficient. The preliminary objection was sustained in a judgment in which it seems to me that the Judges endorsed the finding of the Madras Full Bench that the substance and not the language of the plaint is to be looked to. It was noticed that although a mere declaration was sought, the case was not one which came within the scope of section 42 of the Specific Relief Act, under which alone a plaintiff is entitled to sue for a declaration without consequential relief. Sir Lawrence Jenkins who delivered the judgment observed : "It is a common fashion to attempt an evasion of the Court-fees by casting the prayers of the plaint into a declaratory shape. * * * but the device does not merit encouragement or favour." Later on he remarked that the Courts must be guided by the provisions of section 42 of the Specific Relief Act as they are expressed and should be astute to see that the plaints presented conform to the terms of that section.

The last of the cases cited before us is a decision of this Court *Bua Ditta* v. *Ladha Mal* (3). *Deokali*

(1) (1912) I. L. R. 39 Cal. 704. (2) (1903) I. L. R. 30 Cal. 788.
(3) (1919) 54 I. C. 833.

Koer v. *Kedar Nath* (1) was not apparently cited before the Bench, but *Shrimant Sagajirao Khanderav Naik Nimbalkar* v. *Smith* (2) and *Zinnatunnessa Khatun* v. *Girindra Nath Mukerjee* (3) were, and also the Madras Full Bench decision *Arunachalam Chetty* v. *Rangasawmy Pillai* (4) as well as a later Madras case *Ramanadhan Chettiar* v. *Annamalai Chetty* (5) which followed the Full Bench and held that a suit to declare that a decree is fraudulent and void would not lie unless followed up by a prayer for consequential relief such as an injunction restraining the decree-holder from executing his decree. The suit out of which *Bua Ditta* v. *Ladha Mal* (6) arose was one for a declaration that an arbitrator's award and the decree passed in accordance therewith were based upon fraud and were ineffectual and inoperative against the plaintiff, a prayer being added for any other relief, etc. The Judges held that the Madras rule should be applied, but what they actually did was to direct the Court below to allow the plaintiff an opportunity to amend his plaint so as to include the necessary prayer for consequential relief and to value this relief and to pay court-fee on his valuation.

In my opinion the correct view of such cases as the present is that taken in *Arunachalam Chetty* v. *Rangasawmy Pillai* (4), and *Deokali Koer* v. *Kedar Nath* (1), and they must be held to be declaratory suits in which consequential relief is prayed. The Lower Court, therefore, was right in regarding the suit as one falling under section 7 (*iv*) (*c*) of the Court Fees Act.

There is no allegation that a fresh suit such as the plaintiffs are entitled to bring under Order VII

(1) (1912) I. L. R. 39 Cal. 704.
(2) (1895) I. L. R. 20 Bom. 736.
(3) (1903) I. L. R. 30 Cal. 788.
(4) (1914) I. L. R 38 Mad. 922 (F.B.).
(5) (1915) 29 I. C. 132.
(6) (1919) 54 I. C. 833.

rule 13 would be barred by limitation, and hence I see no reason for adopting the course taken in *Bua Ditta* v. *Ladha Mal* (1). I would simply dismiss this appeal with costs.

FFORDE J. FFORDE J.—I agree.

N. F. E.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Harrison and Mr. Justice Dalip Singh.

NIZAM-UD-DIN (DEFENDANT) Appellant

versus

MUHAMMAD BASHIR KHAN (PLAINTIFF) Respondent.

1927

Feb. 14.

Civil Appeal No. 278 of 1923.

Custom—Succession—Sheikh Qureshis of Palwal town, district Gurgaon—son of predeceased daughter or collateral—Riwaj-i-am.

Held, that it had been proved that by custom among Sheikh Qureshis of Palwal town a son of a predeceased daughter excludes a collateral, as stated in the *Riwaj-i-am* of the Gurgaon district.

Muzaffar Ali v. *Mst. Zainab* (2), and *Beg* v. *Allah Ditta* (3), relied on.

Wazira v. *Mst. Maryam* (4), and *Budha* v. *Mst. Fatima Bibi* (5), referred to.

Rattigan's Digest of Customary Law, para. 23, doubted.

First appeal from the decree of Lala *Suraj Narain, Senior Subordinate Judge, Gurgaon, dated the 12th December 1922, decreeing half of the land in suit and half of house No. 1 in favour of plaintiff, etc.*

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(1) (1919) 54 I. C. 833.
(2) 58 P. R. 1910.
(3) 45 P. R. 1917 (P. C.).
(4) 84 P. R. 1917.
(5) (1922) I. L. R. 4 Lah. 99.