APPELLATE CIVIL.

Before Broadway and Monroe JJ.

1932

Oct. 20.

ATMA RAM AND ANOTHER (DEFENDANTS) Appellants

versus

GODHU RAM AND ANOTHER (PLAINTIFFS)
NATHU RAM (DEFENDANT) } Respondents.

Civil Appeal No 635 of 1930.

Specific Relief Act, I of 1877, Section 42, Proviso: Declaratory suit—where possession is with defendant—whether competent.

One *B.R.* having four sons (two of whom being the present plaintiffs and the other two defendants) executed a will disposing of his property, the bulk of which he left to defendants and *N*, a son of one of the plaintiffs. One plaintiff was disinherited altogether and the other was given a certain amount of property with which he was not satisfied. The defendants propounded the will and took possession of the property. The plaintiffs thereupon brought the present suit asking for a declaration to the effect that they were entitled, along with the defendants, to the entire property left by their father, as members of a joint Hindu family and for a perpetual injunction against the defendants ordering them to refrain from preventing the plaintiffs from retaining joint possession of the property.

Held, that the suit was barred by the *proviso* to Section 42 of the Specific Relief Act, inasmuch as the plaintiffs were clearly not in possession and the defendants were clearly keeping them out of the possession of the property and the plaintiffs could have, and ought to have, sued for recovery of possession of the land either by a suit for joint possession or possession of their share by partition.

Suryanarayanamurti v. *Tammanna* (1), and *Ishwari Singh* v. *Narain Dat* (2), followed.

(1) (1902) I. L. R. 25 Mad. 504. (2) (1914) I. L. R. 36 All. 312.

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v.
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First appeal from the decree of Mir *Ghulam Yazdani, Senior Subordinate Judge, Multan, dated the 8th January, 1930, decreeing plaintiffs' suit.*

FAQIR CHAND and ACHHRU RAM, for Appellants.

BADRI DAS, AJIT PRASADA and KRISHNA SWARUP, for Respondents.

The judgment of the Court was delivered by—

BROADWAY J.

BROADWAY J.—One Bhamba Ram died on the 30th of April, 1927, leaving him surviving four sons, named Atma Ram, Chandu Ram, Godhu Ram and Ram Chand. Godhu Ram had a son named Nathu Ram. Bhamba Ram had on the 4th of April, 1927, executed a will disposing of his property, the bulk of which he left to Atma Ram, Chandu Ram and Nathu Ram, son of Godhu Ram. Godhu Ram was disinherited on the ground that he was of bad character and a disobedient son. Ram Chand was given a certain amount of property for the reason that although he was a disobedient son, his character was not bad. Ram Chand appears to have begun giving trouble and on the 26th of April, 1927, Bhamba Ram executed a codicil in which he slightly varied the disposition of his property, taking care that the property left to Ram Chand should not be shared by any of the other legatees in order to avoid further trouble. Immediately on the death of Bhamba Ram, which took place, as already stated, on the 30th of April, 1927, Atma Ram and Chandu Ram appear to have propounded the will, although probate of it was not taken out and to have taken possession of the property and dealt with it according to the terms of the said will. This resulted in a suit by Godhu Ram and Ram Chand which was filed on the 6th of August,

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1927, and in which the plaintiffs sought a declaration to the effect that they were entitled, along with the defendants, to the entire property left by their father, Bhamba Ram, as members of a joint Hindu family, and further asking for a perpetual injunction against the defendants Atma Ram and Chandu Ram to the effect that they should allow the plaintiffs to retain joint possession in equal shares of the entire property of which a list was appended to the plaint. Various pleas were raised by the defendants, one of them being a preliminary one to the effect that the suit for a declaration and issue of perpetual injunction could not lie in its present form. The defendants alleged that they were the absolute owners in possession of the property received by them under the will, that the plaintiffs were not in possession thereof and that therefore the suit was incompetent. Further preliminary objections were taken on the question of the court-fee and the following two issues were settled as preliminary ones :—

(1) " Does not the suit lie in the form in which it is framed?

(2) If it lies, what should be the court-fee?

The learned Senior Subordinate Judge disposed of these issues by an order dated the 18th of October, 1928. He held that the court-fees paid were sufficient and, without discussing the question, held further that the suit as brought was competent. The suit then proceeded and was finally decreed in the plaintiffs' favour on the 8th of January, 1930

Against this decision the defendants have preferred this appeal and Mr. Achhru Ram on their behalf has pressed, as a preliminary matter, the ques-

tion of the competency of the suit as brought. He urged that the suit, according to the plaint, was one for a declaration and an injunction and that as the plaintiffs were at that time able to institute a suit either for joint possession or for possession by partition, the proviso to section 42 of the Specific Relief Act came into operation and the suit should have been dismissed. It is perfectly clear that the position taken up by the defendants from the moment of the death of Bhamba Ram was that the property had belonged to their father alone, that the will was a valid and competent one and they had proceeded to act on it. Indeed the plaint itself showed that the defendants had definitely notified to the plaintiffs that the will existed; that they were acting on it; and were in possession of the property left by their father as owners under the will, and offered to hand over to the plaintiffs as legatees whatever their father had left to them. It has been admitted by Mr. Ajit Parshad that on the death of Bhamba Ram his clients Godhu Ram and Ram Chand could have instituted a suit either for joint possession as co-owners or for possession of their share by partition. Realising that a suit in such circumstances merely for a declaration was obviously incompetent, Mr. Ajit Parshad pressed the point that a further relief had been claimed, inasmuch as in the plaint the plaintiffs asked for a perpetual injunction. An examination of the plaint shows that the injunction asked for was for an order directed against the defendants ordering them to refrain from preventing the plaintiffs from retaining possession of the property. Inasmuch as the plaint itself shows that the plaintiffs were not in possession of the property, it is clear that this injunction was one that could never have been granted.

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Admittedly the granting of a declaration is a discretionary matter and according to the proviso to section 42 of the Specific Relief Act it has been laid down that no Court should make any such declaration where the plaintiff being able to seek relief other than a mere declaration of title omits to do so. Our attention has been drawn to *Suryanarayanamurti* v. *Tammanna* (1), which appears to be directly in point. There the plaintiff sued his brother, his sister and his brother's son for a declaration of the invalidity of a will which purported to have been executed by his late father by which certain property had been bequeathed to one of the defendants. The plaintiff claimed that the property was ancestral, and that he was entitled to his share in it by right of survivorship, the testator having no power to bequeath it. No claim was made in the plaint for partition of the property which was stated to be in the possession of tenants under leases granted by plaintiff and the first defendant. It was held that the suit was barred by the proviso to section 42 of the Specific Relief Act, inasmuch as the plaintiff might have sued for partition of his share in what he claimed to be the joint family property. Mr. Ajit Parshad has endeavoured to differentiate this case by saying that there only a declaration was asked for, whereas in the present case a prayer for an injunction, of a very futile nature, has been added. This view of the Madras Court is supported by a decision of the Allahabad High Court in *Ishwari Singh* v. *Narain Dat* (2), where it was held that the fact that land was waste and therefore of no immediate practical use was no bar to the application of section 42 of the Specific Relief

(1) (1902) I. L. R. 25 Mad. 504. (2) (1914) I. L. R. 36 All. 312.

Act, where the plaintiff being admittedly out of possession claimed only a declaration of his title. Their Lordships towards the end of their judgment say as follows :—

" In the present case the plaintiffs were admittedly out of possession and the defendants are obviously keeping them out of it. The plaintiffs, therefore, could have sued and ought to have sued for recovery of possession of the land in suit."

This seems to me to be the position in the case now before us. The plaintiffs are clearly not in possession and the defendants are equally clearly keeping them out of possession. The plaintiffs, therefore, could have and ought to have sued for recovery of possession of the land either by a suit for joint possession or for possession of their share by partition. There are various other authorities which support the view set out and the authorities relied upon by Mr. Ajit Parshad afford him no assistance. Indeed the principles enunciated in the cases cited by the learned counsel are in complete accord with those enunciated in the Madras and Allahabad cases.

In my judgment the suit as framed was incompetent and should have been dismissed. Mr. Ajit Parshad finally asked to be allowed to amend the plaint by adding a prayer for joint possession. At this stage of the proceedings, I consider that it would be wrong to allow the amendment asked for. Further, it has been brought to our notice that the plaintiff have brought a suit for partition of this property. The matter decided in this case by the learned Senior Subordinate Judge will no doubt have to be reopened and redecided in the suit for partition. I would

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therefore, accept this appeal and dismiss the plaintiffs' suit with costs throughout.

The cross objections filed on behalf of the respondents by Mr. Ajit Parshad are also dismissed with costs.

A. N. C.

Appeal accepted.

APPELLATE CIVIL.

Before Bhide J.

1932

Oct. 24.

HAR LAL AND OTHERS (DEFENDANTS) Appellants
versus
SRI RAM (PLAINTIFF) Respondent.

Civil Appeal No. 4 of 1931.

Limitation—Starting point of—on Appeal—insufficiently stamped—where deficiency has been made up subsequent to institution of appeal under order of the appellate Court—Civil Procedure Code, Act V of 1908, Section 149.

Held that where an Appellate Court ordered the Court-fees on the memorandum of appeal to be made up by a certain date and it was made up accordingly the Court-fee must be held to be effective from the date of the original institution of the appeal (*vide* Section 149 of the Code of Civil Procedure) and limitation must be computed up to that date and not the date of payment of the additional Court-fee.

Faizullah Khan v. *Mauladad Khan* (1), and *Jawala Singh* v. *Dhano* (2), relied upon.

Second appeal from the decree of R. S. Lala *Ghanshyam Das, District Judge, Hissar, dated the 22nd August, 1930, affirming that of* Sheikh *Mohammad Hussain, Subordinate Judge, 3rd class, Hissar, dated the 13th June, 1930, by dismissing the appeal as time-barred.*

(1) (1929) I. L. R. 10 Lah. 737, 743 (P. C.). (2) (1931) 133 I. C. 122.