

## APPELLATE CIVIL.

*Before Addison and Din Mohammad JJ.*

HURMAT ALI SHAH (PLAINTIFF) Appellant  
*versus*  
 TUFAIL MOHAMMAD AND OTHERS (DEFENDANTS)  
 Respondents.

1934

Dec. 17

Civil Appeal No. 168 of 1934.

*Specific Relief Act, I of 1877, section 42, proviso :  
 Declaratory suit — whether affected by fact that during  
 pendency of the suit the right to possession has also accrued  
 to plaintiff.*

*Held*, that the plaintiff's right to maintain a suit for a  
 declaratory decree is not affected by the fact that during the  
 pendency of the suit the right to possession has also accrued  
 to him.

*Mussammatt Sat Bharai v. Mst. Sat Bharai* (1), dissented  
 from.

*Sodhi Kartar Singh v. Sher Singh* (2), *Fateh Moham-  
 mad v. Nizam-ud-Din* (3), and *Fateh Shah v. Bahab Shah*  
 (4), relied upon.

*Second Appeal from the decree of Mr. A. R.  
 Cornelius, District Judge, Jullundur, dated 16th  
 October, 1933, modifying that of Lala Raghunath  
 Lal, Subordinate Judge, 2nd class, Nakodar, dated  
 27th June, 1933, and dismissing the plaintiff's suit in  
 toto.*

BADRI DAS, for Appellant.

ACHHRU RAM, for Respondents.

*The order, dated 9th July, 1934, submitting the  
 case to a Division Bench:—*

BECKETT J.—Shah Mohammad made a will leav-  
 ing certain immovable property to his sister's grand-  
 sons, who took possession after his death. Hurmat  
 Ali Shah then brought the present suit for a declara-  
 tion that the will would not affect his reversionary  
 rights after the death of *Mussammatt Umri*, wife of  
 Shah Mohammad, who had survived her husband.

BECKETT J.

(1) 65 P. R. 1913.

(3) 18 P. R. 1900.

(2) 50 P. R. 1895.

(4) 1927 A. I. R. (Lah.) 128.

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*Mussammat* Umri died during the pendency of the suit, thus giving the plaintiff the right to sue for possession. Hurmat Ali Shah was given an opportunity of amending his plaint, but refused to do so. His suit has been dismissed on the ground that he cannot now be given the relief which he had claimed in the plaint although the findings of the lower Appellate Court are in his favour as regards part of the land in suit.

The first question to be decided in this appeal is whether the right to sue for a mere declaratory decree survives to the plaintiff if a right to sue for possession in respect of the same subject-matter accrues during the course of the suit. On this question there appear to be contradictory decisions. The decision upon which the learned District Judge has relied is that given in *Mussammat Sat Bharai v. Mst. Sat Bharai* (1), in which the following passage occurs:—

“ We hold, therefore, that the right to sue for a *declaratory decree* came to an end when *Mussammat Fateh Bibi* died, and that neither *Mussammat Jind Waddi* herself nor the applicants had or have any right thereafter to sue for *that relief*.”

*Mussammat Jind Waddi* in this case was the original plaintiff and *Mussammat Fateh Bibi* was a widow on whose death the succession opened out.

To the opposite effect, we have the decision in *Fateh Shah v. Bahab Shah* (2), in which the following passage occurs:—

“ The plaintiff’s right to maintain the suit for a declaratory decree is not affected by the death of Bahab Shah during the pendency of the appeal.”

This decision followed *Govinda v. Perumdevi* (3), in which it was held that the proviso to section 42 of

(1) 65 P. R. 1913.

(2) 1927 A. I. R. (Lah.) 128.

(3) (1889) I. L. R. 12 Mad. 136.

the Specific Relief Act refers to the position of the plaintiff at the date of the suit.

There is also a passage in *Lakhu Mal v. Bishen Das* (1), in which the same view appears to have been taken. The authorities, however, are not discussed.

I find it impossible to reconcile the propositions which have been enunciated in these decisions; and as the question is one which is liable to arise frequently in the Subordinate Courts, I think this appeal should be heard by a Division Bench.

*The judgment of the Division Bench was delivered by—*

DIN MOHAMMAD J.—Shah Mohammad made a will relating to his immovable property which was taken possession of by the legatees after his death. His collateral, Hurmat Ali Shah, brought a suit for a declaration that the will would not affect his reversionary rights after the death of *Mussammât Umri*, widow of Shah Mohammad. During the pendency of the suit *Mussammât Umri* also died. Hurmat Ali Shah was given an opportunity of amending his plaint but he refused. His suit was consequently dismissed on the ground that he could not be given a mere declaratory relief after the death of Shah Mohammad's widow. On appeal the learned District Judge confirmed the decision of the trial Court on this point and dismissed the appeal.

Hurmat Ali Shah appealed to this Court. The appeal came before a Single Bench, but in view of the importance of the question involved it has been sent to a Division Bench for disposal.

The principal point for consideration in this case is whether a plaintiff who has brought a suit for a

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mere declaration can be compelled to ask for the consequential relief that has arisen after the institution and during the pendency of the suit. The learned District Judge has relied on *Mussammatt Sat Bharai v. Mst. Sat Bharai* (1), decided by a Bench of the Chief Court and held that the right to claim a declaratory decree lapsed as soon as the widow died and as it was open to the plaintiffs at that time to seek further relief the suit could not continue as framed. We, however, consider that *Mussammatt Sat Bharai v. Mst. Sat Bharai* (1) does not lay down the correct law on the point and appears to be opposed to the general principles of law governing such cases.

We have first to consider section 42 of the Specific Relief Act. This section enacts :—

“ Any person entitled to any legal character or to any right as to any property may institute a suit against any person denying or interested to deny his title to such character or right and the Court may in its discretion make therein a declaration that he is so entitled and the plaintiff need not in such suit ask for any further relief :

Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.”

Reading the proviso with the substantive part of the section it becomes clear that the prohibition contained in the proviso relates to the period of time when the suit is instituted and not to a subsequent period. Under the substantive part of the section any person entitled to any right as to any property may institute a suit against any person denying or interested to deny his right and the Court may in its discretion make

therein a declaration that he is so entitled. It is clearly provided for in this part of the section that the plaintiff need not in such suit ask for any further relief. The proviso enacts the prohibition against the grant of such declaration and lays down that where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so, no declaration shall be made in his favour. Reading, therefore, the words occurring in the substantive part of the section "and the plaintiff need not in such suit ask for any further relief" with the words occurring in the proviso "being able to seek further relief than a mere declaration of title, omits to do so," no doubt remains in our mind that the words occurring in the proviso are merely explanatory of the concession granted to the plaintiff in the substantive portion of the section. If therefore, at the time when the suit is instituted, the plaintiff is not able to seek any further relief than a mere declaration of title, he need not in his suit ask for any further relief and his suit will be competent under the substantive portion of section 42. If, on the other hand, he is at that time able to seek further relief than a mere declaration of title and omits to do so, his suit will be barred under the proviso. Evidently, therefore, the ability of the plaintiff to seek further relief dates to the time when the suit is brought and cannot be utilised against him if that ability comes into existence, only after the institution of the suit and during the pendency of the trial. His right will be adjudicated upon, as it existed at the time of the institution of the suit, and if later he does not choose to pursue the remedy that has become then available, he cannot be compelled under the law to do so. This appears to us to be the obvious interpretation of section 42; read with the proviso.

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We are fortified in our conclusion by authority. In *Fateh Mohammad v. Nizam-ud-Din* (1), a question similar to this arose before a Bench of the Chief Court where the donor had died one day after the appeal was filed and it was contended that the respondents were entitled only to a decree for possession and not to a decree for the declaration granted to them. The learned Judges brushed aside the preliminary point raised by the appellants by merely remarking that at the date of the decree of the Court of first instance the respondents were not entitled to possession.

In *Sodhi Kartar Singh v. Sher Singh* (2), Mr. Justice Chatterji as a member of the Bench in a case analogous to the one before us observed as follows:—

“What we have to consider is the state of facts existing at the time the suit was brought. As plaintiffs were not then entitled to anything, but a mere declaration, nothing that happened subsequently can affect their right to have their claim, as then laid, adjudicated on the merits.”

In *Fateh Shah v. Bahab Shah* (3), a Bench of this Court placed the same construction on section 42 of the Specific Relief Act as we have done, and held that the plaintiff's right to maintain the suit for a declaratory decree was not affected by the fact, that during the pendency of the suit the right to possession also had accrued to him.

We are, therefore, of opinion that the suit as framed was maintainable.

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Costs will abide the event.

A. N. C.

*Appeal accepted;*  
*Case remanded.*

(1) 18 P. R. 1900. (2) 50 P. R. 1896.

(3) 1927 A. I. R. (Lah.) 128.