## APPELLATE CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.*

1910. *April* 13.

BAI SHRI VAKTUBA (ORIGINAL DEFENDANT 1), APPELLANT, *v.* THAKORE AGARSINGHJI RAISINGHJI (ORIGINAL PLAINTIFF), RESPONDENT, AND RANSINGHJI AGARSINGHJI (ORIGINAL DEFENDANT 2), APPELLANT, *v.* THAKORE AGARSINGHJI RAISINGHJI (ORIGINAL PLAINTIFF), RESPONDENT.*

*Specific Relief Act (I of 1877), section 42—Civil Procedure Code (Act VIII of 1859), section 15—15 and 16 Vic., c. 86, s. 50—Suit by plaintiff for mere declaration that the minor defendant was not his son—Investigation of claim without delay.*

A Talukdar-plaintiff brought a suit for a declaration that defendant 2, a minor, was not his son and that he was not born to the plaintiff's wife, defendant 1, and for an injunction restraining defendant 1 from proclaiming to the world that defendant 2 was plaintiff's son and from claiming maintenance for him as such son. The defendants contended that the suit was not maintainable under the provisions of the Specific Relief Act (I of 1877) and that it was premature.

*Held*, that the suit was maintainable, it being within the provisions of section 42 of the Specific Relief Act (I of 1877).

*Held*, further, that in the interests of justice it was of the highest importance that such claims should be investigated and decided without unnecessary delay, and when the controversy had once been brought to trial the decision should ordinarily follow the usual course.

*Fool* v. *Ewing*(1) distinguished.

FIRST appeal from the decision of Chandulal Mathuradas, First Class Subordinate Judge of Surat, in Suit No. 503 of 1902.

The plaintiff, who was the Talukdar of the Guaf State in the Dhandhuka Taluka, sued for a declaration that the minor defendant 2 was not his son and that he was not born to his wife, defendant 1, and also to obtain a perpetual injunction restraining the defendant 1 from proclaiming to the world that defendant 2 was his son, from establishing that the said defendant was his natural born son and from claiming maintenance from the plaintiff as such son. The plaintiff alleged that he was married to defendant 1 about ten or twelve years before the suit,

* Joint Appeals Nos. 46 and 57 of 1906.

(1) (1903) Ir. Rep. 1 Ch. 434.

that thereafter she lived with the plaintiff as his lawfully wedded wife but as no son was born to her on account of ill-health and other natural defects, the plaintiff married a second wife, that defendant 1, thereupon, with a view to set up a supposititious son, left the plaintiff and went to live with her father in the village of Vadgaum in Cambay and that in a previous proceeding instituted by the plaintiff against defendant 1 in the Court at Cambay she urged that a son was born to her, hence the present suit.

Defendant 1 answered that the suit was unsustainable under the provisions of the Specific Relief Act, that the plaintiff had filed a similar suit in the Court at Cambay and he withdrew it without liberty to file a fresh suit, therefore, the present suit was opposed to the provisions of sections 12 and 373 of the Civil Procedure Code of 1882, that she had no natural defects and she all along served the plaintiff as his wife, that as she was expecting her confinement she went to live with her father and gave birth to defendant 2 on the 1st September 1901 at her maternal uncle's house, that defendant 2 was plaintiff's son and that no cause of action had accrued to the plaintiff.

The Subordinate Judge found that the plaintiff's suit was not opposed either to the provisions of section 42 of the Specific Relief Act or to the provisions of sections 12 and 373 of the Civil Procedure Code of 1882. He, therefore, allowed the claim.

Defendants preferred joint appeals Nos. 46 and 57 of 1906.

*Raikes*, with *T. R. Desai*, appeared for the appellant (defendant 2) in appeal No. 57 of 1906.

We contend that a suit like the present cannot lie in a Civil Court. The plaintiff-Talukdar claimed a declaration that the infant-defendant is not his son, that his wife was not pregnant and that no son was born to her. The lower Court erred in making the declaration relying on illustration (*a*) to section 42 of the Specific Relief Act. We submit that (1) such a declaration cannot be made under section 42 and that, (2) even if it can be made the lower Court erred in the exercise of its discretion in granting the relief against the infant.

First, because there is no denial by the infant-defendant of any right or character of the plaintiff, nor is he interested in

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denying the plaintiff's title to such character or rights because his own rights have not yet come into existence. The plaintiff, as Talukdar, is entitled to enjoy his estate for life and the fact of the infant's existence is no denial of the plaintiff's rights during his life-time. The infant has not claimed anything against the plaintiff, therefore section 42 of the Specific Relief Act has no application. Section 15 of the Civil Procedure Code of 1859 as interpreted by the High Courts and the Privy Council supports our contention: *Kathama Natchiar* v. *Dorasinga Tever*(1), *Sheo Singh Rai* v. *Mussumat Dakho*(2). The English Statute on which section 42 of the Specific Relief Act is based is in the same direction: 15 and 16 Vic., c. 86, s. 50. These authorities show that the plaintiff is not entitled to the relief which has been granted to him. A declaratory decree should not be made unless there is a right to some consequential relief which, if asked for, might have been granted: *Fischer* v. *Secretary of State for India*(3).

Secondly, even if such a case falls under section 42 of the Specific Relief Act, the present is not the case in which the Court should exercise its discretion in plaintiff's favour: *Yool* v. *Ewing*(4), *North-Eastern Marine Engineering Company* v. *Leeds Forge Company*(5). The interest of the minor defendant should not be prejudiced by deciding a question which will arise in the future. It would not be necessary to decide at this stage intricate questions when no immediate effect can be given to the decision and when the postponement of the decision will not prejudice the plaintiff's rights in any way: *Hunsbutti Kerain* v. *Ishri Dutt Koer*(6). English Courts always keep back the decision in such cases. On the merits we submit that the evidence in the case does not justify the finding in plaintiff's favour. Direct and circumstantial evidence of a strong character is required in a case of this nature.

*Inverarity*, *Branson* and *B. G. Desai*, with *M. N. Mehta* and *N. K. Mehta*, appeared for the respondent (plaintiff).

The present suit is maintainable under section 9 of the Civil Procedure Code of 1908 and section 42 of the Specific Relief Act.

(1) (1875) L. R. 2 I. A. 169.
(2) (1878) L. R. 5 I. A. 87.
(3) (1893) L. R. 26 I. A. 16 at p. 27.
(4) (1903) Ir. Rep 1 Ch. 434.
(5) (1906) 1 Ch. 325.
(6) (1879) 5 Cal. 512.

Section 9 of the Civil Procedure Code allows all suits of a civil nature excepting suits of which cognizance is either expressly or impliedly barred. There can be no doubt of the civil nature of the present suit and there is no law which either expressly or impliedly bars such a suit: *Aunjona Dasi* v. *Prahlad Chandra Ghose*[1], *Mir Azmat Ali* v. *Mahmud-Ul-Nissa*[2]. The Talukdari estate of which the plaintiff is the owner is impartible and inalienable without the sanction of Government under section 31, clause 1 of the Gujarat Talukdars' Act, and it descends according to the rule of primogeniture. It has been held in *Himmatsing* v. *Ganpatsing*[3] that although the son of a Talukdar is debarred from claiming a partition of the estate in his father's life-time, he may sue for maintenance out of the estate. See also *Ramchandra Sakharam Vagh* v. *Sakharam Gopal Vagh*[4]. Supposing that the defendant is a legitimate son, he would be entitled to an interest in the estate and so he would be interested in denying the plaintiff's right being free from his claim to maintenance out of the estate. Therefore the present suit clearly falls under section 42, illustration (*f*) of the Specific Relief Act. The rulings in *Rajah Nilmony Singh* v. *Kally Churn Battacharjee*[5] and *Kathama Natchiar* v. *Dorasinga Tever*[6] were not decided under section 42 of the Specific Relief Act. They went upon the old Chancery Practice Cases. The law has been altered in this respect; see Daniel's Practice, pp. 630, 631. No action or pleading is now open to the objection that a mere declaratory judgment order is sought thereby and the Court is empowered to make a binding declaration of rights whether any consequential relief is or could be claimed or not. The power thus given is discretionary and whether the Court will exercise its discretion depends on the circumstances of the particular case: *Ellis* v. *Duke of Bedford*[7], *West* v. *Lord Sackville*[8].

Under the Judicature Act a suit can be maintained for perpetuating testimony, Order 37, Rule 35. No such procedure is provided in India and so it becomes necessary to file suits of this

(1) (1870) 6 Beng. L. R. 243.
(2) (1897) 20 All. 96.
(3) (1875) 12 Bom. H. C. R. 94.
(4) (1877) 2 Bom. 346.
(5) (1874) L. R. 2 I. A. 83.
(6) (1875) L. R. 2 I. A. 169.
(7) (1899) 1 Ch. 494 at p. 499.
(8) (1906) 2 Ch. 325.

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nature while facts are fresh, witnesses are alive and are in a position to depose to facts of a recent date as pointed out by the Privy Council in *Chandrasangji* v. *Mohansangji*[1]. The decision in *Yool* v. *Ewing*[2] is not applicable to the present case. In that case there was no question relating to a right to an impartible estate and the rules and orders relied on in that case were not similar to section 42 of the Specific Relief Act.

SCOTT, C. J.:—The plaintiff claims in this suit a declaration that the second defendant is not his son and that he was not born to the first defendant and for an injunction restraining the defendant 1 from proclaiming to the world that the defendant 2 is plaintiff's son and from claiming maintenance for him as such son.

The plaintiff is a Talukdar and the first defendant is his wife, who alleges that, after leaving the plaintiff's house, a son was born to her who had been begotten by the plaintiff.

No claim for maintenance has as yet been made on behalf of the second defendant. He is an infant less than two years of age and neither he nor anyone on his behalf has set up any claim by him as heir to the estate of the plaintiff. The Talukdari estate of which the plaintiff is owner descends according to the rule of primogeniture, it is impartible and inalienable without the consent of Government and it has been held in this Court that although the son of a Talukdar is debarred from claiming a partition of the estate in his father's life-time, he may sue for maintenance out of the estate, *Himmatsing* v. *Ganpatsing*[3].

The question which arises at the outset is whether such a suit as this will lie. It has long been established that the general power vested in the Courts in India under the Civil Procedure Code to entertain all suits of a civil nature excepting suits of which cognizance is barred by any enactment for the time being in force, does not carry with it the general power of making declarations except in so far as such power is expressly conferred by statute.

(1) (1906) 30 Bom. 523. (2) (1904) Ir. Rep. 1 Ch. 434.
(3) (1875) 12 Bom. H. C. R. 94.

In *Kathama Natchiar* v. *Dorasinga Tever*[1] the JudicialCommittee state:—"They at first conceived that the power of the Courts in India to make a merely declaratory decree was admitted to rest upon the 15th section of the Code of Civil Procedure of 1859, the effect of which has been so much discussed. Mr. Doyne, however, raised some question as to that, and suggested that the power was possessed by the Courts in the Mofussil, before the Code of Procedure was passed, and had not been taken away thereby. No authority which establishes the first of these propositions was cited; and their Lordships conceive that if the legislature had intended to continue to those Courts the general power of making declarations (if they ever possessed such a power), it would not have introduced this clause into the Code of Procedure, which, if a limited construction is to be put upon it, clearly implies that any decree made in excess of the power thereby conferred would be objectionable, the words of the section being:—'No suit shall be open to an objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the Civil Courts to make binding declarations of right without granting consequential relief.' Nor does any Court in India since the passing of the Code seem to have considered that it had the power of making declaratory decrees independently of that clause." It was held by their Lordships in the case from which the above quotation is drawn, that the application of section 15 of the Code of Procedure of 1859 must be governed by the same principles as those upon which the Court of Chancery proceeded in exercising the power conferred by 15 and 16 Vic., c. 86, s. 50, with such slight modifications as might be required by the different circumstances of India and by the different constitution of the Courts in that country, and that a declaratory decree could not be made unless there was a right to consequential relief capable of being had in the same Court; or under special circumstances as to jurisdiction in some other Court.

There can, we think, be no doubt that if the law as to declaratory decrees were still governed by section 15 of Act of 1859, this

(1) (1875) L. R. . A. 169 at 179.

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suit would not be maintainable, having regard to the decisions in England under 15 and 16 Vic., c. 86, s. 50, and the opinion expressed by the Judicial Committee in the case above referred to. The law, however, is now governed by section 42 of the Specific Relief Act of 1877, which provides as follows :—

"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."

On behalf of the defendant, reliance is placed upon a passage in the judgment of the Judicial Committee in *Fischer* v. *Secretary of State for India in Council*[1] to the effect that there can be no doubt as to the origin and purpose of section 42 that it was intended to introduce the provisions of section 50 of the Chancery Procedure Act of 1852 (15 and 16 Vic., c. 86) as interpreted by the Judicial decisions and that before the Act of 1852 it was not the practice of the Court in ordinary suits to make a declaration of right except as introductory to relief which it proceeded to administer. The Judicial Committee however in that case were not considering exhaustively the different cases in which declaratory decrees might be passed.

It is contended on behalf of the plaintiff that he is a person entitled to a right to his Talukdari estate free from any claim to maintenance by or on behalf of the second defendant, and therefore that the Court may, in its discretion, make a declaration in this suit that he is so entitled.

There can, we think, be no doubt that the assertion which has been proved to have been made by the father of the first defendant with reference to the paternity of the second defendant, may lead to serious consequences from the point of view of

(1) (1893) L. R. 20 I. A. 27.

the plaintiff. It is well known that disputes often arise as to the true paternity of boys who are put forward as heirs to Talukdari estates. The prevalence of such disputes is illustrated by the letter of the Collector of Ahmedabad of the 9th of December 1897, Exhibit 131 in this case, where he calls attention to the desirability of Talukdars having their wives submitted to medical examination, when it is alleged that they are pregnant. It is not that such boys are often objected to as being bastards but as being supposititious sons of women who have never born sons.

As a particular instance of the evil now under discussion, we may refer to a passage in the judgment of the Judicial Committee in *Chandrasangji* v. *Mohansangji*[1], where, with reference to a case of an alleged supposititious child of a Talukdar, their Lordships observe:—"The extraordinary length of time which was allowed to elapse after the 14th May 1883, the date upon which everything turns, and the 12th December 1894, when the present suit was filed, is also a circumstance very adverse to the respondent. During all that interval, with the exception of a part of 1893 and 1894, when negotiations for a compromise were in progress, there was never a time at which proper steps might not, and ought not, to have been taken to secure a full trial of the question in issue; and that question is one which, from its nature, specially required to be disposed of while the facts were fresh."

It appears to us that having regard to the really serious nature of the question with which the plaintiff was faced as soon as the assertion was made that a son, not admitted by him, had been born to his wife, his contention as to his right under section 42 of the Specific Relief Act is perfectly reasonable and we hold that this suit is a suit which falls within the purview of section 42.

The question then arises is whether the Court below in entertaining the suit has exercised a proper discretion in the matter. On the one hand, it is extremely desirable that all evidence which may be forthcoming with reference to the birth and paternity of

(1) (1906) 30 Bom. 523 at p. 533.

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the second defendant should be taken while it is still available. On the other hand, we have to bear in mind the considerations stated as follows by Mr. Justice Joyce in *N. E. Marine Engineering Co.* v. *Leeds Forge Co.*(1). "In simple cases, the mere fact that A is supposed to contemplate the bringing of an action against B, or that A may have stated that he has grounds for such an action, does not entitle B to institute an action against A to have it declared that A has not a good cause of action against B, I think that is so whether the result depends merely upon questions of law or upon facts, as to which there would, or might, be a conflict of evidence and a protracted trial. Ordinarily, an intending plaintiff may postpone his action as long as he pleases at the risk of finding himself ultimately barred by some Statute of Limitations, and he may choose his own time for commencing proceedings. He is entitled to wait until he has collected the necessary evidence, or has made such inquiries as he thinks fit, or has obtained the requisite funds, or what not."

We do not think that in the present suit these considerations are of much force. For it is not the case here that the plaintiff is seeking prematurely to force his opponent's hand; on the contrary the plaintiff's own hand has been forced by the open assertion of a definite claim on behalf of the minor defendant, a claim which the plaintiff is entitled to repel now when the material evidence is obtainable. To hold that, although the suit is maintainable, the Court below wrongly exercised its discretion in granting the declaration sought amounts for practical purposes to holding that the plaintiff, openly threatened with this serious claim, is condemned to inactivity for, it may be, 20 or 30 years, leaving it to the claimant to file his suit at such time as most assists him in taking the plaintiff at a disadvantage. The remarks of the Judicial Committee which we have already quoted indicate how prejudicial to the plaintiff's cause such inactivity would be, and it is plain that every day during which the plaintiff remained quiescent under an adverse claim of this character, would strengthen the case against him.

(1) (1906) 1 Ch. 325 at 329.

We have not overlooked the fact that the second defendant is an infant of very tender years who was represented only by the Official Nazir of the Court as his guardian, and we have considered whether it would not be best to reverse the decree under appeal and stay the suit with liberty to the plaintiff to apply for its removal from the Stayed List in the event of the second defendant setting up any claim based upon the allegation that he is the plaintiff's son. But having regard to all the circumstances and being of opinion that the lower Court has come to a correct conclusion upon the question of fact we think that our proper course is to affirm the decree. It is no longer the practice to stay suits against infants until they have attained full age, as it is generally considered that an infant's case can be sufficiently placed before the Court by a duly constituted guardian. Such a guardian we have here, and though the whole of the case for the defence is that which was put forward by the first defendant, that is a circumstance of no moment to the present argument. From the very nature of the case the claim on behalf of the infant had to be put forward during his infancy, and the person best qualified to put it forward was the first defendant. In reality indeed it is as much her claim as his, and the record satisfies us that she has supported her pretensions with all the evidence procurable in that behalf. The plaintiff, being entitled to bring this suit, is entitled on the evidence to the decree made in his favour, and his rights are not to be curtailed by reason of the fact that the false claim made against him had to be made while the second defendant was yet an infant. Technically the infant has been duly represented; substantially his case has been put before the Court fully and completely with all, even more than all—the evidence which could honestly be called in aid of it. In the interests of justice it is of the highest importance that claims of this character should be investigated and decided without unnecessary delay, and when the controversy has once been brought to trial the decision should ordinarily follow in the usual course. We do not find in this case sufficient reasons for upsetting the decision come to and suspending the whole dispute indefinitely.

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Much reliance has been placed by the defendant's Counsel upon the case of *Yool* v. *Ewing*(1). That, however, was a case in which no question arose as to the right of inheritance to an impartible and inalienable estate and the words of the Rules and Orders relied upon by the Master of the Rolls as indicating that no suit for a declaration of bastardy could be maintained, are not identical with the terms of section 42 of the Specific Relief Act.

We affirm the decree of the lower Court and dismiss the appeal with costs.

We order the appellant to pay the Court fees which would have been paid by him if he had not been permitted to appeal as a *pauper*.

*Decree affirmed.*

G. B. R.

(1) (1904) Ir. Rep. 1 Ch. 434.

## APPELLATE CIVIL.

*Before Mr. Justice Chandavarkar and Mr. Justice Heaton.*

1910.
*July* 8.

NANABHAI BAJIBHAI PATEL (ORIGINAL DEFENDANT), APPELLANT, *v.* THE COLLECTOR OF KAIRA AND OTHER LEGAL REPRESENTATIVES OF INAMDAR PANDURANG SADASHIV (ORIGINAL PLAINTIFF), RESPONDENT.*

*Bombay Land Revenue Code (Bombay Act V of 1879), sections 3 (11) and 217†—Survey settlement introduced into Inam village—Inamdar's name entered as Khatedar—Permanent tenant of the Inamdar before the settlement—Inamdar's right to enhance rent.*

Section 217 of the Bombay Land Revenue Code (Bombay Act V of 1879) is not restricted in its application to registered occupants only: it invests "the holders of all lands" in alienated villages with the same rights and imposes

* Second Appeal No. 186 of 1905.

† The sections run as follows:—

Section 3 (11)—"holder" or "landholder" signifies the person in whom a right to hold land is vested, whether solely on his own account, or wholly or partly in trust