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30 C. 783.

second will. Each applied for Letters of Administration. They then presented this document of the 3rd of February 1894 by way of a petition to the Court. It was signed both by Gyanoda and Ishwara. No order was made on the petition: on the contrary, the Court said it could not act upon it, and Letters of Administration with the will annexed were granted to Gyanoda. The question is whether this document falls within sub-section (*b*) or sub-section (*h*) of section 17 of the Indian Registration Act. It recited the facts I have stated, as well as the two applications for probate, and then it said: "The above two cases have been amicably settled amongst us on the terms following:—that I, Gyanoda Sundari Dassi, will get a ten-anna share of all moveable and immoveable properties left by the said Kristomoni, deceased, and I, Ishwara Chandra Sarkar, will get the remaining six-anna share." After these allegations, the prayer was that Letters of Administration might be granted to the two. Then it says: "Be it explicitly expressed that, after taking out the Letters of Administration, I, Gyanoda Sundari Dassi, shall amicably take ten-anna share, and I, Ishwara Chandra Sarkar, shall take six-anna share of the moveable and immoveable properties after dividing the shares by demarcation." No order was made upon this application. This instrument is a non-testamentary instrument: the question is whether it purports or operates to create or declare any right, title or interest in any immoveable property of the value of over 100 rupees. It is conceded that the property here is over that amount. I think it clearly purports or operates to create or declare the rights and interests of the brothers and sister in the property in dispute, and consequently that it required to be registered. I do not see how we can fairly bring this document within sub-section (*h*), and say that it creates a right to obtain another document, which will when executed "create, declare, assign or extinguish any such right, title or interest." There is no reference to the execution of any other document. The case is governed in principle by the Privy Council decision in the case of *Pranal Anni* v. *Lakshmi Anni* (1).

[788] Lastly, it was said that the plaintiffs had notice of this agreement. I do not think that helps the defendant. There is no finding upon that, one way or the other. If they had, they would only have notice of an agreement which required registration, and which without registration would be inadmissible in evidence against them.

Those are the only points argued, and, in my opinion, they fail, and the appeals must be dismissed with costs.

GEIDT, J. I concur.

Appeals dismissed.

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30 C. 788.

APPELLATE CIVIL.

ZINNATUNNESSA KHATUN *v.* GIRINDRA NATH MUKERJEE.*

[11th June, 1903.]

Declaratory decree—Consequential relief—Court-fees Act (VII of 1870), Sch. II, Art. 17, cl. (iii) and s. 7, cl. iv (c).

* Appeals from Original Decrees Nos. 1 and 2 of 1901, against the decrees of Kali Dhan Chatterjee, Additional Subordinate Judge of Faridpore, dated Sept. 10, 1900.

(1) (1899) I. L. R. 22 Mad. 508; L. R. 26 I. A. 101.

A suit in which the only prayer is to have it declared that a certain decree is ineffectual and inoperative against the plaintiff, is a suit for a declaratory decree without consequential relief and falls within Sch. II, Art. 17, cl. (3) and not under s. 7, cl. (c) of the Court-fees Act (VII of 1870).

Shrimant Sagajirao v. *Smith* (1) relied upon.

[Expl. and Dist. 11 C. W. N. 705=6 C. L. J. 427. Ref. 38 M. 1184 ; 21 C. W. N. 375=35 I. C. 797 ; 1 L. W. 824. Foll. 9 I. C. 673.]

APPEALS by the plaintiffs, Zinnatunnessa Khatun and another.

These two appeals arose out of two suits brought by the plaintiffs to have it declared that the decrees in civil suits Nos. 12 and 13 of 1889, of the Subordinate Judge of Faridpore, were ineffectual and inoperative as against the plaintiffs. The prayers in the two plaints were the same and to the following effect :—"It was accordingly prayed that it might be declared that the decree in civil [789] suits Nos. 12 and 13 of 1889, of the Subordinate Judge of Faridpore, and the ascertainment of the mesne profits and the proceedings connected with it were ineffectual and inoperative against the plaintiffs, and that the plaintiffs were not bound by the same." The plaintiff was filed with a court-fee of Rs. 10, although the suit was valued at Rs. 7,313-12-5-0¼. On the 25th August 1900, the Subordinate Judge passed the following order :—

"In this suit and in its analogous suit No. 12 of 1900 plaintiff's prayer is to make some decrees of wasilat inoperative and not binding against her. In the plaints each of these suits is valued at Rs. 7,013-12-5¼ pies. As I have doubt regarding the value of plaintiff's suits, yesterday I heard the pleaders of both sides, and plaintiff's pleader, Tara Nath Babu, stated before me the value of the suits had been correctly given in the plaint as regards jurisdiction to be Rs. 7,013-12-5¼ pies in each of them. In each case, however, the plaint was filed on Rs 10 court-fee, which is the court-fee required where declaratory decree without consequential relief is prayed for. This prayer of these suits clearly shows consequential relief was prayed for, inasmuch as the plaintiff has prayed for a declaration that she may be absolved from the liability of certain decree. So although the wording of plaintiff's prayer is clothed in the form which apparently shows it has been made to obtain a declaratory decree only, yet it is evident from the plaintiff's prayer that her main object is to annul the effect of the wasilat decree. I think therefore consequential relief of the value of the decree has been prayed for in each of these suits, and as such, under section 7, sub-section (4), clause (c) of the Court-fees Act, plaintiff ought to pay court-fee for plaint according to the amount at which relief is sought in her plaint. Plaintiff therefore must pay the deficit court-fee of her plaint by the 10th September 1900."

On the 10th September 1900, the plaintiff's pleader not having paid the deficit court-fee, the learned Subordinate Judge rejected the plaints.

Babu *Basanta Kumar Bose*, Dr. *Ashutosh Mookerjee* and Babu *Surendra Nath Gupta* for the appellants in appeals Nos. 1 and 2.

Babu *Harendra Nath Mookerjee* and Babu *Charoo Chunder Ghose* for the respondent in appeal No. 1.

Babu *Jogesh Chander Roy*, Babu *Harendra Nath Mookerjee* and Babu *Charoo Chunder Ghose* for the respondents in appeal No. 2.

MACLEAN, C. J. These appeals must be allowed.

The case appears to me to fall within Article 17 of the Second Schedule to the Court-fees Act of 1870, sub-section (iii), and not [790] under section 7, sub-section (iv), clause (c). 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. It may very well be that as the result of setting aside the decree in question, some ulterior benefit may directly or indirectly flow to the plaintiff. But what we have to look at is what he asks for by his plaint. It is

(1) (1895) I. L. R. 20 Bom. 736.

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clear looking at the plaint that all that the plaintiff asks for is a declaratory decree and he does not ask for any consequential relief. The case of *Shrimant Sagajirao Khanderav Naik Nimbalkar* v. *Smith* (1) accords with this view.

The appeals must therefore be allowed. The court-fee paid was sufficient, and the plaintiff must be allowed to go on with the suits. The appellant is entitled to his costs in these appeals.

GEIDT, J. I concur.

Appeals allowed.

30 C. 790 (=8 C. W. N. 906.)

APPELLATE CIVIL.

SARAT CHANDRA DEY v. BROJESHWARI DASSI.* [4th June, 1903.]

Limitation—Limitation Act (XV of 1877) ss. 4, 5, 12 and Sch. II, Art. 170—"Appeal"—Leave to appeal in forma pauperis.

The word "appeal" in s. 5 of the Limitation Act (XV of 1887) does not include an application for leave to appeal in forma pauperis.

Lakshmi v. *Ananta Shanbaga* (2) and *Parbati* v. *Bhola* (3) referred to.

[Ref. 12 C. L. J. 173=15 C. W. N. 205=7 I. C. 118.]

APPEAL by the defendants, Sarat Chunder Dey and another.

This appeal arose out of an action brought by the plaintiff, Brojeshwari Dassi, against the defendants to enforce a mortgage bond. The bond was executed in favour of the plaintiff by the [791] defendants on the 21st Falgoon 1297 B. S. (4th March 1891) and was duly registered. The defence mainly was that the suit was not maintainable by the plaintiff, as she was only a *benamdar* for her deceased husband, and that the full consideration for the bond did not pass to them. The Court of first instance having overruled the said objection decreed the suit on the 20th July 1899.

The defendants not being able to prefer an appeal against the said decree on payment of proper court-fees, applied, on the 20th November 1899, to the High Court for leave to appeal *in forma pauperis*. This application was heard on the 27th November 1899, and the following order was passed :—"Subject to the enquiry to be made by the Lower Court in the pauperism of the appellants the petitioners will be allowed to prosecute the appeal as paupers." The enquiry by the Lower Court having been made, the High Court, on the 2nd April 1900, made the following order in the presence of the vakils of both the appellants and the respondent : "By an order of this Court, dated the 27th November last, the applicants were, subject to the results of an enquiry by the Lower Court into their pauperism, allowed to appeal *in forma pauperis*. The enquiry has since been made, and the last report of the Court below is in favour of the applicants. That being so, we allow the petitioners to prosecute this appeal *in forma pauperis*, and we direct that the appeal be registered."

On the appeal coming on for hearing.

Dr. *Ashutosh Mukherjee* (Babu *Sarat Chandra Khan* with him), for the respondent, took a preliminary objection to the hearing of the

* Appeal from Original Decree No. 109 of 1900, against the decree of Prasanna Kumar Ghose, Subordinate Judge of Nadia, dated July 20, 1899.

(1) (1895) I. L. R. 20 Bom. 736.
(2) (1879) I. L. R. 2 Mad. 230.
(3) (1889) I. L. R. 12 All. 79.