

ALLAHABAD HIGH COURT

Bishan Sarup

Vs

Musa Mal

(Bennet, J.)

17.04.1935

ORDER

Bennet, J.

1. This is a reference by the Taxing Officer to me as Taxing judge under Section 5 Court-fees Act. The reference embraces two matters : firstly, whether the court-fee paid on the memorandum of S.A. No. 51 of 1933 by the plaintiff-appellant is sufficient, and secondly, whether the court-fee paid by the plaintiff in the trial Court and in the lower appellate Court is sufficient. Learned Counsel has argued that on the strength of a ruling of a Bench of this Court, of which I was a member in *Mitthu Lal v. Chameli* 1934 All 805, the jurisdiction in regard to the alleged insufficiency of the court-fees in the lower Court lies with a Bench under Section 12(2), Court-fees Act. I accept that view. The jurisdiction of the Taxing Officer to make a reference under Section 5 Court-fees Act, is in regard to the payment of the court-fee in the High Court. This section shows that the question relates only to this Court as the section uses the words "any fee under this chapter." Chapter 2 deals with fees in the High Courts and in the Court of Small Causes of Presidency Towns. It does not deal with the court-fee payable in other Courts and in the present case the suit was brought in the Court of a Munsif and the appeal was brought in the District Court. Now, the question at issue is whether the fee should be that of a declaratory suit or an ad valorem court-fee. The plaint asked for the following relief: It may be declared that by virtue of the purchase made under the sale-deed, dated 24th October 1931, in favour of defendant 1, and under the sale-deed, dated 21st October 1931, in favour of defendant 2, which are null and void and ineffectual as against the plaintiff and the joint family property-defendants 1 and 2 did not acquire any right to any part of the houses mentioned at the foot hereof.

2. Learned Counsel desired to rely on a ruling of a Bench of this Court reported in *Radha Krishna v. Ram Narain*¹ That was a suit for cancellation of a compromise and decree. The plaintiff amended his plaint to the effect that there should be declaration that the petition of compromise and the decree were ineffectual against the plaintiff and he was not bound thereby. It was held that the plaint as amended was sufficiently stamped and that the suit was to obtain a

declaratory decree where no consequential relief was prayed, and therefore the suit fell under Schedule 2, Court-fees Act, Article 17(3). The present suit, differs because the declaration is desired not in regard to a decree, but in regard to a written instrument. The present suit clearly comes under Section 39 Specific Relief Act which provides that Any person against whom a written instrument is void or voidable...may sue to have it adjudged void or voidable; and the Court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.

3. The section further provides that a copy of the Court's judgment shall be sent to the Registering Officer and the fact of cancellation shall be noted on a copy of the instruments in the Sub-Registrar's books. The granting of a decree therefore under Section 39, Specific Relief Act, involves the consequential relief that the document is cancelled. On the other hand, a declaratory suit in regard to a decree does not come under Section 39 and does not involve the same consequential relief. Learned Counsel was not able to produce any ruling showing that a suit under Section 39 Specific Relief Act, in regard to a written instrument does not require an ad valorem court-fee. The contrary in fact has been held in *Akhlaq Ahmad v. Karam Elahi*² in which it was held that in a similar suit for a declaration to declare a sale-deed void, Article 17(3), Schedule 2, Court-fees Act, did not apply and that Article 1, applied and that suit required an ad valorem court-fee. There is also a Full Bench decision of this Court reported in *Kalu Ram v. Babu Lal*³ This lays down that where a suit is for the cancellation of an instrument under Section 39, Specific Relief Act the relief is not a declaratory one. It falls neither under Section 7(4)(c) nor under Schedule 2, Article 17(3), but under Article 1, Schedule 2, Court-fees Act. This Full Bench settles the matter finally.

4. Accordingly I hold that the plaintiff-appellant must pay an ad valorem court-fee in this Court within six weeks from this date. The matter in regard to the court-fees in the two lower Courts will be referred to a Bench of two Judges and I may be a member of that Bench.

Niamatullah, J.

5. The plaintiff paid a court-fee of Rs. 20 on two declaratory reliefs. The Stamp Reporter construed the reliefs as those for cancellation of instruments, on which ad valorem court-fee on the value of the subject-matter was payable in the lower Court. The case was laid for decision before a Division Bench, which referred two questions for decision by a Full Bench. The reliefs in question were claimed by the plaintiff on the allegation that he and his brother Komal Jha formed a joint Hindu family owning, inter alia, two houses, that Komal Jha sold one of them by a deed, dated 24th October 1931, to the first defendant, and sold the other by a deed dated 21st October 1931, to the second defendant, that Komal Jha had no right to execute the aforesaid sale-deeds, which are "null and void and ineffectual", that the plaintiff is in possession of the houses: in dispute and is entitled to have it declared that the purchasers (defendants 1 and 2), did not acquire any right to the houses in dispute by virtue of their respective purchases, which are void against the plaintiff and the joint family. After these allegations, the plaintiff proceeded to claim

the following reliefs: It may be declared that by virtue of the purchase made under the gale deed, dated 24th October 1931, in favor of defendant 1, and under the sale deed, dated 21st October 1931, in favor of defendant 2, which are null and void and ineffectual as against the plaintiff and the joint family property, defendants 1 and 2 did not acquire any right to any part of the houses mentioned at the foot hereof.

6. The plaintiff treated these reliefs as of declaration and paid a court-fee of Rs. 20, i.e., Rs. 10 in respect of each relief. No question was raised in the lower Courts. Eventually the plaintiff's suit was dismissed on the merits. He appealed to this Court, where the question arose for the first time on the report of the Stamp Reporter as to whether the reliefs are those for cancellation of the two sale-deeds referred to in the plaint. A reference to Section 42, Specific Relief Act, with its illustrations (to which I shall advert later), will show that a plaintiff is entitled to sue for a declaration that a certain transfer, being void or voidable at his option, does not affect his right in the property to which it relates. Section 39 of that Act, on the other hand, provides that any person against whom a certain instrument is void or voidable may sue to have it adjudged void or voidable, and the Court may in its discretion so adjudge it and order it to be delivered up and cancelled. Section 40 of the same Act, provides for partial cancellation of an instrument "where it is evidence of different rights or different obligations." Seemingly the two sections overlap each other, and the same relief may be considered to be one for declaration or for cancellation. "Declaring" and "adjudging" are expressed by the same word in Urdu, namely, "istiqrar", so that, where a plaintiff claims an "istiqrar" that a document is void against him and against his interests, he can be understood to be claiming a declaration that the transfer evidenced by a certain deed is void and ineffectual against him and against his interest. He may also be understood as suing for the instrument being adjudged void against him, and therefore claiming the relief of cancellation. As held in *Kalu Ram v. Babu Lal*⁴ it is not necessary for the plaintiff to ask for the document being delivered up and cancelled, which is for the Court to direct. In these circumstances, questions frequently crop up in this Court on office reports in cases in which declaratory suits were entertained in the lower Courts and disposed of as such. The Stamp Reporter maintains in all such cases that the relief claimed by the plaintiff is one for cancellation, and he points to the relief claimed by the plaintiff as one amounting to a demand for the instrument being adjudged void. The plaintiff, on the other hand, protests against his suit being treated as one for cancellation, and lays stress on the fact that he claims no more than a declaration that the transfer evidenced by a certain instrument, which is characterised as void or voidable, does not affect his interests? The present case is an instance in point. Ex facie, the relief as worded in the original plaint may be so rendered in English as to make it arguable that it is a relief of cancellation. As against this, it can be urged, with at least equally good reasons, that the plaintiff is claiming no more than a declaration of his right to the property conveyed by the sale-deeds, which are characterised as void and not affecting his rights. In this state of the matter, the Division Bench, before which the case was originally laid, referred the following two questions for decision by a Full Bench:

(1) Where a plaint is so worded as to disclose a suit falling either under Section 39 or Section 42, Specific Relief Act, is it open to a Court to treat the suit as one falling within the purview of Section 39, Specific Relief Act, if the plaintiff desires it to be construed as one under Section 42, Specific Relief Act? and (2) Whether the court-fee payable on the plaint and the memorandum of appeal in the lower appellate Court in this case should be ad valorem on the value of the subject-matter, or Rs. 10 only under Article 17(3), Schedule 2, Court-fees Act?

7. The answer to the first question will largely depend upon the scope of Section 42, Specific Relief Act. Does that section permit a suit for a declaration that the plaintiff has a right to a certain property which is not affected by the transfer evidenced by a certain instrument? If it does and the plaint in a given case, read as a whole, can be construed as a claim for a declaration of that kind, there can be no reason why the plaintiff's desire to have it treated as a suit for declaration and not as one for cancellation should not be given effect to.

8. The Court-fees Act, which was passed in 1870, does not make any specific provision in respect of a suit for cancellation. Section 7(4)(c) provides for a suit "to obtain a declaratory decree or order where consequential relief is prayed." Schedule 2, Article 17, provides a fixed fee of Rs. 10 for a suit "to obtain a declaratory decree where no consequential relief is prayed." The Specific Relief Act was passed seven years after the Court-fees Act, and statutory provision was made for the first time in respect of suits for cancellation (Sections 39 and 40) as distinct from suits for declaration (Section 42). Before the passing of the Specific Relief Act, a suit for cancellation, was treated, by this and other High Courts as one for a declaratory relief, where consequential relief was prayed, so that court-fee was payable on the value put by the plaintiff on the relief sought by him: see the cases noted in *Karam Khan v. Daryai Singh* (1883) 5 All 331, in which it was held for the first time by a Full Bench of five Judges that the relief of cancellation of an instrument, contemplated by Section 39, Specific Relief Act, was in the nature of a relief for a declaratory decree, in which no consequential relief was claimed. This view does not appear to have been questioned till comparatively recently, when another Full Bench of five Judges considered the question in *Kalu Ram v. Babu Lal* 1932 All 485(*Supra*), in which the plaintiff sued for cancellation of a decree passed on the basis of a compromise in a suit brought on a mortgage-deed executed by a member of a joint Hindu family of which the plaintiff was a member. The question was whether the suit should be considered to be one for a simple declaratory relief or for a declaratory relief with a consequential relief. It was held that Where a suit is for the cancellation of an instrument under the provisions of Section 39, Specific Relief Act, the relief is not a declaratory one. It falls neither under Section 7(vi), (c), nor under Schedule 2, Article IV(iii), but under the residuary Article Schedule 1, Article 1, Court-fees Act, which provides for ad valorem court-fee on the value of the subject-matter. The Court proceeded to hold The court-fee in respect of the prayer for cancellation of the decree is payable under Schedule 1, Article 1, on the value of the decree. As the compromise has merged in the preliminary decree, and the latter has merged in the final decree, we consider that the cancellation of the compromise, preliminary decree and the final decree are not "distinct subjects" within the meaning of Section

17, but in reality only one subject.

9. It should be noted that in that case there was no ambiguity and there was no question whether the suit was for cancellation or for declaration. The plaintiff intended to claim, and expressly claimed, for cancellation of a decree, but maintained, on the authority of *Karam Khan v. Daryai Singh* (1883) 5 All 331, that for purposes of court-fees all suits for cancellation are suits for declaration, in which no consequential relief is claimed. It should also be observed that a decree was treated as an instrument, within the meaning of Section 39, Specific Relief Act. The question was not prominently raised, and it is difficult to say what the decision of the Court would have been if it had been argued that a decree could not be an instrument within the meaning of that section. This question was subsequently raised in another Full Bench case, *Sri Krishna Chandra v. Mahabir Prasad*⁵ in which it was held that where the plaintiff merely asks for a declaration that the previous decree is not, in any way, binding on him and is altogether void and ineffectual, the suit was one for declaratory relief only and fell under Article 17(3), Schedule 2, Court-fees Act, and the court-fee of Rs. 10 was sufficient. It was observed that: The case of a decree stands on a different footing, because a suit to avoid it does not strictly fall under Section 39, Specific Relief Act. Strictly speaking, it would not even fall within the scope of Section 42, Specific Relief Act. Where the plaintiff chooses to ask for a definite relief for the cancellation of a decree or for the setting aside of that decree in addition to a declaration that the decree is not binding upon him, he is professedly asking for something more than a mere declaratory decree. At the stage at which the question of court-fee arises, it is immaterial to consider whether such a relief is superfluous, redundant or useless, or even impossible to be granted. Obviously, he has asked for more; and so long as he does not amend his plaint and abandon this relief, he can be called upon to pay court-fee for the relief asked for.

10. In the case noted last the relief of cancellation of decree had been asked for, and the learned Judges, therefore treated it as a suit for a declaration that the decree was void and not binding on the plaintiff, on which a court-fee of Rs. 10 was considered to be sufficient under Article 17(3), Schedule 2, Court-fees Act.

11. In this state of authorities I am bound to follow the later Full Bench rulings in preference to *Karam Khan v. Daryai Singh*⁶ and to hold that where a plaintiff expressly claims the relief of cancellation such as is contemplated by Section 39, Specific Relief Act, the suit is not one for a declaratory relief with or without consequential relief, and that the relief of cancellation is itself a substantial relief on which ad valorem' court-fee under Article 1, Schedule 1, is payable. I however find nothing in these cases which justifies the view that though the plaintiff does not expressly claim the relief of cancellation, but a mere "istiqrar" (declaration or adjudication) an alienation evidenced by an instrument is void against him and does not affect his interest, the relief claimed by him must be construed as one for cancellation despite his emphatic disclaimer.

12. It was argued by the learned Government advocate that if the plaintiff makes a specific

reference to an instrument in the relief paragraph of his plaint characterising it as void or voidable and asks for a declaration that it is not binding upon him he must be taken to be claiming the relief of cancellation under Section 39, Specific Relief Act, inasmuch as he virtually asks for the document being adjudged void which is the only claim which he need make in a suit for cancellation. It is pointed out that it is the Court which is given the discretion to order that, the instrument be "delivered up and cancelled whether the plaintiff asks for it or not. Reliance is placed on the case reported as Kalu Ram v. Babu Lal 1932 All 485(Supra), wherein it was observed in reference to the terms of Section 39, Specific Relief Act, and the illustrations appended to it that The relief is available even to persons other than parties to an instrument and in respect of both void and voidable instruments. It is equally clear that a plaintiff need only ask for the instrument to be adjudged void or voidable and need not in express terms ask for it to be delivered up and cancelled. Even though no relief of cancellation is asked for, a Court may grant cancellation also. But this does not prevent a plaintiff from also asking in express terms a relief for its being delivered up and cancelled, if he feels that having it merely adjudged void or voidable would not be adequate for his purpose.

13. I fully accept the correctness of this view. The learned Judges did not lay down that even where a plaintiff expressly states that he does not claim cancellation, but only a declaratory relief contemplated by Section 42, Specific Relief Act, the Court should nevertheless treat the suit as one for cancellation and compel the plaintiff to pay enhanced court-fee. The learned Judges further observed that:A relief to have a registered instrument adjudged void or voidable with the possible result of its being delivered up and cancelled and a copy of the decree being sent to the Registration Office for a note to be made by the Registering Officer in his books is much more than a mere declaratory relief. It is undoubtedly a substantial relief of a nature differing from a declaratory one.

14. It is argued that, where a plaintiff asks for a declaration that an instrument is void and does not affect his interests, the Court may adjudge the instrument to be void and order it to be delivered up and cancelled and that in so far as there is a possibility of such a result, the suit should be treated as one for cancellation, as laid down in the dictum last quoted. I am unable to accept this contention because if the plaintiff makes it clear in the plaint or subsequently by an amendment or by a statement in the nature of pleadings that his suit is not one under Section 39, but under Section 42, there is no possibility of the Court ordering the instrument to be delivered up and cancelled under Section 39, which is not *ex hypothesi* relied on. I may note that in the case before the Full Bench the plaintiff had expressly claimed the relief of cancellation of a decree, and any observations therein made in reference to cases in which the relief of cancellation is not expressly claimed are in the nature of *obiter dicta* and not binding; but I am prepared to accept even such *dicta*, as, it was far from the intention of the learned Judges to hold that it was open to the Court to treat a suit as one under Section 39 though in form it could be one under Section 42, and though the plaintiff maintains and desires that his suit should be treated as one for declaration under Section 42, Specific Relief Act.

15. The learned Government Advocate seemed to suggest that Section 42, Specific Relief Act, merely contemplates cases in which a declaration of a right to property or to any legal character is claimed without reference being made to any instrument and that if a document is specifically, referred to in relation to the plaintiff's right which he seeks to be declared, the suit ceases to be one for a declaration and becomes one for cancellation of the instrument. This view of Section 42 is refuted by the illustrations appended to it and is otherwise incorrect. A person's rights may depend upon the validity or invalidity of a deed affecting them, and it may be impossible to declare his right without adjudicating upon the validity of such deed. Illustration (c) to Section 42 permits a suit for declaration that a certain covenant is void for uncertainty. The, covenant, assuming it to be in writing, must be referred to in order to declare that it is void. Similarly, illustration (d) permits a suit for a declaration that an alienation made by the holder of a life-interest is void against a reversioner. The deed by which the alienation was made, must of necessity be referred to in granting the declaration. In this connexion Section 40, Specific Relief Act, which provides for partial cancellation, has a material bearing. If the argument above referred to is correct, the declaration amounts to a partial cancellation of the instrument by which the property is alienated. The declaration which the Court can grant in such a case, is that the deed is void, except as regards the life-interest of the alienor. If the argument noted above is correct, the relief amounts to a partial cancellation of the deed and to that extent the suit is not one for declaration. The same is the case with Illustration (e). Illustration (f) permits a suit for a declaration that an adoption is invalid. If the adoption is evidenced by a registered instrument, such a suit- if the argument in question is correct- will be one for cancellation and cease to be a suit for declaration. I am clearly of opinion that it is permissible for a plaintiff to obtain a declaration under Section 42, Specific Relief Act, that a certain instrument is void against him and does not affect his rights.

16. It seems to me clear that the scope of Section 39, Specific Relief Act, is distinct from that of a suit under Section 42 of that Act. If the plaintiff desires the cancellation of an instrument he asks for its complete annulment, and if the Court grants such relief, the instrument ceases to be a subsisting deed. It is delivered up and cancelled. A note is to be made in the Registration Office that it has been annulled. When a deed is cancelled, everything which is done by the executant thereof is undone by the Court. For all practical purposes the contents of the deed wholly or in part are, so to say, effaced. If the plaintiff seeks such a relief, the suit is one under Section 39, Specific Relief Act. But the plaintiff may not be advised to seek a relief of such a drastic character, and it may be enough for his purposes to seek, the relief of a limited nature described in Section 42. The object of such a relief is to obtain a recognition of the plaintiff's right to property, and the void or voidable character of an instrument comes under consideration incidentally for determining the plaintiff's right. In taking such a course the plaintiff foregoes all the advantages conferred by the relief of cancellation and subjects himself to certain limitations imposed by Section 42. It should be noted that Section 39, Specific Relief Act, does not in terms provide that, where a plaintiff is able to claim a further relief, the Court shall not grant the

adjudication claimed by him, Cases are easily conceivable in which a plaintiff may claim a relief of cancellation and may not claim any other relief, though he may be able to do so. Section 39, does not expressly provide, as is done by Section 42, that his suit should, on that account, be dismissed. A plaintiff may obtain the cancellation of an instrument which he establishes to be forged, and may not claim any relief of injunction restraining the defendant from enforcing his supposed rights thereunder. Of course the relief being discretionary, the Court may not grant the relief, of cancellation in the circumstances of a given case. It may also be that a plaintiff omitting to claim a further relief may be subsequently barred by Order 2, Rule 2, Civil P.C. These are however matters beyond the purview of Section 39, which itself does not compel a plaintiff to seek a further relief. On the other hand, Section 42, Specific Relief Act, entitles a plaintiff to ask for a comparatively limited relief, namely, that an instrument is void against him and does not affect his interests. Such a relief, if granted, has not the effect of completely annulling the document wholly or in part. The plaintiff merely safe-guards his rights. The instrument will subsist and be effective for all purposes other than those declared by the decree. In certain cases, besides claiming a declaratory relief, the plaintiff is in a position to claim also the relief of cancellation or the setting aside of a deed. In such cases, the suit may be liable to be dismissed.

17. That the relief that a certain sale is void against the plaintiff and does not affect his rights is not a relief of cancellation, but only a declaratory relief has been held by their Lordships of the Privy Council *Moti Lal v. Kharbuldin* (1898) 25 Cal. 179, where their Lordships observed as follows: Then the learned Judge holds that the suit is barred by Article 12, Limitation Act, because it is, or ought to be, one to set aside the sale of 22nd October 1884. But the suit is founded on the fact that prior to that sale a valid sale of the same interests had been made to Masih and that Moti took nothing because nothing was left to pass to him. The sale is not set aside but is found not to affect the rights of the plaintiff derived from Masih. The sale does not purport to pass the rights of Masih or of the plaintiff, but those of the mortgagee Agha and the mortgagors Yusuf and Nasim, against whom Masih established his prior rights. Between setting aside a sale and holding that the plaintiff's rights are not affected by it there is a wide difference.

18. In this passage their Lordships have clearly brought out the essential distinction between the cancellation or setting aside of a sale and the declaration that it does not affect the plaintiff's interests. Where the relief of declaration is granted, the sale is not set aside. It may or may not convey the interests of the person making it. If the person making it has no interest to transfer, no interest is conveyed to the transferee. All that the plaintiff prays for, and the Court declares, is that the plaintiff's interest is not thereby conveyed or in any way, affected. Applying this dictum to the case before us, the plaintiff merely seeks a declaration that the deeds impugned by him do not convey or affect the interest of the plaintiff or the joint family, of which he is a member. He does not go further and ask the Court to annul the deed. It is still open to the transferee to rely upon it against the executant thereof for a personal relief against him.

19. Where a plaint is not ambiguous or equivocal and the plaintiff expressly claims the relief of

cancellation of an instrument, or on a proper construction of the plaint as a whole, the Court arrives at a conclusion that the suit is one for cancellation, and the plaintiff sticks to the allegation contained therein, no question can arise and court-fee for cancellation must be paid. Such was the case in *Akhlaq Ahmad v. Karam Elahi* 1935 All 207, decided by a Division Bench of which I was a member. I adhere to the view taken by me in that case.

20. It seems to be an unheard of procedure that the Court should force upon a plaintiff a frame of the suit which he is not willing to adopt. If the allegations contained in his plaint are such as to make it possible to hold that the suit is one for a declaration, the plaintiff is entitled to have it treated as such. If necessary, the Court should direct the plaintiff so to amend it as to leave no doubt that the suit is one for declaration. After a plaintiff has declared unequivocally, by amendment or otherwise, that he desires no more than a declaratory relief of the nature described in Section 42, the Court must proceed on that footing for all purposes of court-fee, leaving the plaintiff to take the consequences of his own action in deliberately instituting a declaratory suit where a suit for cancellation would have been more appropriate. If the question arises in the trial Court, the plaintiff is entitled to make it clear by his pleadings what the nature of his suit is. If the question arises in a Court of appeal, the position is not different in cases of ambiguously worded plaints. Consideration of the frame of the suit for the purposes of court-fee and that for the purposes of decision of the suit must be kept severely apart. If the plaintiff says that he deliberately limits his relief to declaration, no impediment should be thrown in his way for that purpose. When the Court comes to consider the merits of the case, it must pin down the plaintiff to his choice; and if he has made an error in that respect, he must take the consequences. But in determining the court-fee payable, the Court should not allow its mind to be influenced by the consequences which might, in its opinion, follow from the plaintiff's action. Nor should the Court be influenced by the consideration that the plaintiff is actuated by motives of economy and is evading payment of court-fee by not suing for cancellation and suing only for a declaration. It is perfectly legitimate for the plaintiff to avoid the payment of higher court-fee by so framing his suit as to diminish his liability in that respect.

21. Section 6, Court-fees Act, cannot subject a plaintiff to liability to pay court-fee for a relief which he does not ask for. If he claims both the reliefs of declaration and cancellation as he may in certain cases, he must pay for both; but where, on the construction of his plaint in the light of his averment, the Court comes to the conclusion that the plaintiff claims a declaratory relief and not cancellation of an instrument, there is nothing in Section 6, which justifies a demand for two fees.

22. I have already referred to the substance of the plaintiff's claim as laid in the plaint, arid it is, at least possible to construe it as a suit for declaration. In answering the second question I shall have the occasion to go further and hold that it is a suit for declaration; but in answering the first, I content myself with holding that it is, at least, consistent with the hypothesis that it is a suit for declaration. The plaintiff's counsel stated before us that his suit is one for declaration and should

be treated as such, and that he will take all the consequences resulting from that frame of the suit. It was treated as a suit for declaration in both the Courts below. In these circumstances, it is not open to us to treat the suit as one for cancellation a relief which the plaintiff disclaims, This view is supported by a number of decisions of this Court. In *Radha Krishna v. Ram Narain* 1931 All 369(Supra), decided by a Bench of which King, J., was a member, the same view was taken. It should be noticed that in *Kalu Ram v. Babu Lal* 1932 All 485(Supra), the judgment of the Full Bench case was delivered by King, J. In *Brij Gopal v. Suraj Karan*⁷ decided by a Division Bench of this Court of which my brother Bennet was a member, it was held that, for the purposes of determination of the court-fee, actual relief asked for should be looked into, and it is entirely besides the consideration of the Court whether the suit is likely or not to fail because the plaintiff did not ask for a consequential relief. In *Lakshmi Narain Rai v. Dip Narain Rai* 1933 All 350, observations to the same effect were made. It was a case of a decree; but the actual decision did not rest on that ground. In *Abdul Samd Khan v. Anjuman Islamia Gorakhpur* 1934 All 56, decided by a Bench of this Court of which my brother Rachhpal Singh and myself were the members, the same view was taken.

23. My view finds support from the latest Full Bench case *Sri Krishna Chandra v. Mahabir Prasad*⁸ The learned Chief Justice, who delivered the judgment of the Full Bench, observed as follows: Obviously the Full Bench *Kalu Ram v. Babu Lal* 1932 All 485(Supra) did not intend to lay down that where the plaintiff deliberately omits to claim a consequential relief and contents himself with claiming a mere declaratory decree, the Court can call upon him to pay the court fee on the consequential relief, which he should have claimed although he has omitted to do so. What was held was that if the plaintiff does not ask for a mere declaratory decree, but also asks for a relief which he calls 'consequential' relief, the mere fact that he calls it so would not prevent the Court from demanding full court-fee, if in reality the additional relief claimed was a substantial relief and not a mere consequential relief; we do not think that the observation was intended to go further than this.

24. For the reasons stated above, I answer the first question in the negative and hold that it is not open to the Court to treat the suit as one for cancellation contrary to the assertion of the plaintiff which is not inconsistent with the substance of the plaint.

25. The second question depends upon the right construction of the plaint, which should be considered as a whole. In my opinion, the relief claimed by the plaintiff is a declaration of his right to the property transferred by the third defendant, and that the transfers evidenced by the sale-deeds executed by the latter did not affect the plaintiff's, rights or the rights of the joint family, of which he is a member. The plaintiff intended to claim a relief of declaration and more, and he expressed his intention in words which did not take the case out of the category of declaratory suits. He could not avoid reference to the sale-deeds in asking for the declaration of his right, and a mere reference to the sale-deeds cannot make the suit otherwise than one for declaration. I have already referred to the illustrations to Section 42, which clearly contemplate a

relief couched in terms, employed by the plaintiff in this case. If the plaintiff had made no reference to the "sale-deeds" in the relief paragraph of the plaint and had mentioned only the "sales" which are detailed in the body of the plaint, there would have been no substantial difference. It cannot be the law that, if the plaintiff avoids a reference to the deed in the last paragraph of the plaint, but attacks it in the earlier parts of it, the suit is one for declaration otherwise it is a suit for cancellation. If such be the law it can be very easily circumvented. The plaintiff can make every necessary allegation in the earlier paragraph of the plaint and so word the reliefs, as to avoid pointed reference to the deed itself. I hold that the court-fee of Rs. 10, for each of the two reliefs claimed by the plaintiff was sufficient under Article 17(3), Schedule 2, Court-fees Act, and that ad valorem court-fee on the value of the subject-matter is, not the proper court-fee.

Rachhpal Singh, J.

26. The two questions which are referred to the Full Bench are:

- (1) Where a plaint is so worded as to disclose a suit falling either under Section 39 or Section 42, Specific Relief Act, is it open to a Court to treat the suit, as one falling within the purview of Section 39, Specific Relief Act, if the plaintiff desires it to be construed as one under Section 42, Specific Relief Act? (2) Whether the court-fee payable on the plaint and the memorandum of appeal in the lower appellate Court in this case should be ad valorem on the value of the subject-matter, or Rs. 10 only under Article 17(iii), Schedule 2, Court-fees Act?

(2)

27. In the opinion of the Learned Judges who referred this case to a Full Bench, there appeared to be some divergence of opinion as regards the construction to be placed on the earlier Full Bench rulings in *Kalu Ram v. Babu Lal* 1932 All 485(Supra) and *Sri Krishna Chandra v. Mahabir Prasad* 1933 All. 488(Supra), which was indicated by the judgment in *Akhlaq Ahmad v. Karam Elahi* 1935 All 207(Supra).

28. Section 7, Sub-clause (4)(c), Court-fees Act, enacts that in suits to obtain a declaratory decree or order where consequential relief is prayed, the court-fee shall be paid according to the amount at which the relief sought is valued in the plaint or memorandum of appeal. And for this purpose it is enjoined that in such a suit the plaintiff shall state the amount at which he values the relief sought. Article 17, Clause (3), Schedule 2, prescribes that a court-fee of Rs. 10 shall be paid in suits which are instituted to obtain a declaratory decree where no consequential relief is prayed for.

29. Section 6, Court-fees Act, enacts that:

Except in the Courts hereinbefore mentioned, no document of any of the kinds specified as

chargeable in Schedules 1 or 2 to this Act annexed shall be filed, exhibited or recorded in any Court of justice, or shall be received or furnished by any public officer, unless in respect of such document, there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document.

30. It will be seen that the section imposes a duty on Courts to see that no document which is chargeable with court-fee under the Schedules 1 and 2, Court-fees Act, is received or issued unless the requisite court-fee has been paid.

31. Now, when a plaint in which a declaratory relief is asked for is presented to a Court, it has to decide whether the case is one in which a plaintiff seeks to obtain a decree or order where a consequential relief is prayed or is the case one where he seeks a more declaratory decree without praying for a consequential relief? If the case appears to be one in which the consequential relief is prayed, then, the court-fee payable will be ad valorem on the amount at which the relief sought is valued in the plaint or memorandum of the appeal in accordance with the provisions of Section 7, Sub-clause (4)(c), Court-fees Act. On the other hand where the plaint or the memorandum of appeal shows that the plaintiff seeks to obtain a declaratory decree with no consequential relief then the court-fee will be Rs. 10 with reference to the provisions of Article 17, Clause (3), Schedule 2, Court-fees Act. When a plaint is presented to a Court in which a declaratory relief is sought the first thing which it has to decide is whether the court-fee paid is sufficient. In order to decide this question the Court must look into the allegations, made in the plaint and for the purpose of deciding the question of sufficiency or otherwise of the court-fee paid, it will be assumed that the allegations made in the plaint are correct. The Court at that stage is not entitled to go into the question of truth or falsity of the case set up by the plaintiff. In *Lakshmi Narain Rai v. Dip Narain Rai*⁹ a Bench of two learned Judges of this Court observed that: Question of court-fee must be decided on the plaint and the decision is not affected by the question whether the suit is maintainable under Section 42, Specific Relief Act, or by any action subsequently taken by the plaintiff to obtain an injunction otherwise than by amendment of the plaint.

32. In *Venkata Ramani Iyer v. Narayanaswami Iyer*¹⁰ it was remarked that: The determination of the category to which a suit belongs must depend upon the relief which the plaintiff prays for because court-fees must be determined with reference to the prayer contained in the plaint. The Court must ascertain what the plaintiff actually asks for in his plaint and must not speculate what may be the ulterior effect of his success.

33. It appears to me that it is a well settled rule of law now that Courts have ample power to decide on averments in the plaint whether the remedy for consequential relief has been sought. A plaint may on the face of it show that the plaintiff is only seeking to obtain a declaratory decree without asking for any consequential relief. But the substance of the plaint may demonstrate that as a matter of fact he is asking not only for a mere declaration, but for consequential relief as

well. The Court will look to the substance and not merely to the form, of the plaint. It is now further well settled that if the plaint shows that a plaintiff is asking not only for a mere declaration, but also for a consequential relief, then, he must pay ad valorem court-fee. In *Kalu Ram v. Babu Lal* 1932 All 485, the Full Bench made the following observations:

The Court has to see what is the nature of the suit and of the reliefs claimed, having regard to the provisions of Section 7, Court-fees Act. If a substantive relief is claimed though clothed in the garb of a declaratory decree with a consequential relief, the Court is entitled to see what is the real nature of the relief, and if satisfied that it is not a mere consequential relief, but a substantive relief, it can demand the proper court-fee on that relief irrespective of the arbitrary valuation put by the plaintiff in the plaint on the ostensible consequential relief.

34. I have no doubt that a Court has ample power to decide, for the purpose of determining the court-fee to be paid, whether in substance a plaint is one in which : (1) a mere declaratory relief is claimed, or (2) declaratory relief combined with a consequential relief is claimed, or (3) declaratory relief plus substantive relief is claimed. The next question which we have to consider is whether a Court can insist that a plaintiff should frame his suit in such a manner so as to include a prayer for a consequential relief. On the decision of this question would depend the answer to be given to the first question referred to the Full Bench. In *Deokali Koer v. Kedar Nath*¹¹ Sir Lawrence Jenkins, C.J., delivering the judgment of the Full Bench observed: It is a common fashion to attempt an evasion of court-fees by casting the prayers of the plaint into a declaratory shape. Where the evasion is successful, it cannot be touched, but the device does not merit encouragement or favour.

35. In *Venkata Ramani Iyer v. Narayanaswami Iyer* 1925 Mad. 713, (*supra*) the learned Judge of the Madras High Court held that: Where a plaintiff is bound to ask both for a declaration and the setting aside of a document but prays merely for declaration, the suit must be treated for purposes of court-fee as one for a declaration. It is not for the Court to say that the plaintiff should have framed his plaint differently and that if he had done so a higher court-fee would have been payable and that, therefore the plaint before the Court should be treated as containing a prayer which it does not in truth contain. If a plaintiff contents himself with asking for a declaration, where he ought to ask for a declaration and consequential relief, the suit is liable to be dismissed not by reason of the improper valuation of the suit, but because it infringes the provisions of Section 42, Specific Relief Act.

36. In *Pathuma Umma v. Aliyammakkanath Moideen*¹² a Bench of two learned Judges of the Madras High Court held that: In the case of an enactment for revenue purposes such as the Court-fees Act, it cannot be said that it is not open to parties to avail themselves of any camouflage that the law allows or does not forbid for escaping liability for court fees.

37. In *Thakur Narayan Singh v. Dildar Ali Khan*¹³ a Bench of two learned Judges of the Patna High. Court decided that: The question of court-fee must be decided on the plaint; and though it is

open to the Court in the case of a suit for a declaration to say that the plaintiff has really asked for a consequential relief, though he has tried to conceal it by casting the reliefs in a particular form, it is not open to the Court to say that the plaintiff should have asked for a consequential relief and should have paid the proper court-fee as in such a suit, the plaintiff is entitled to have the case made by him in the plaint tried by the Court, although he takes the risk that if it is subsequently found that he could have asked for a consequential relief, his suit is liable to be dismissed.

38. In *Radha Krishna v. Ram Narain*¹⁴ a Bench of two learned Judges of this Court held that: The question of court-fee must be decided on the plaint and the decision is not affected by the question whether the suit is maintainable under Section 42 or by any action subsequently taken by the plaintiff to obtain an injunction otherwise than by amendment of the plaint.

39. In *Mohammad Ismail v. Liyaqat Hussain*¹⁵ it was held that: The question of court-fees must be decided with reference to the plaint as it is and not as it ought to have been. If, having regard to the nature of his claim, plaintiff ought to have claimed consequential relief and has not done so, his suit might fall under the proviso to Section 42, Specific Relief Act; but the Court cannot say that the plaintiff should have claimed consequential relief and not having done so, he should be deemed to have claimed the consequential relief and was therefore liable to pay an ad valorem court-fee on the consequential relief.

40. In *Akhlaq Ahmad v. Karam Elahi* 1935 All 207(Suupra), we find the following observations: If a plaintiff deliberately prays for a mere declaration that an instrument is void and if the circumstances of the case are such that the document can be completely annulled, he is, at least, "able" to have the instrument adjudged void, which implies that a copy of the decree annulling it shall be sent to the Registration Office for a note to be made on the copy therein retained, so that anyone searching and inspecting the Registration Office may at once find out that the document, though subsisting at one time, was subsequently annulled. In such a case his suit may be dismissed, being barred by the proviso to Section 42, Specific Relief Act. But, for all purposes of court-fee, it is not open to a Court to say that the plaintiff must be taken to have done what he should have done, though he persists in saying that he does not sue for cancellation.

41. In *Sri Krishna Chandra v. Mahabir Prasad* 1933 All. 488 my Lord the Chief Justice who delivered the judgment of the Full Bench, made the following observations: The learned Advocate for the respondents has relied strongly on a passage in *Kalu Ram v. Babu Lal*¹⁶ where it was remarked that if a substantive relief is claimed though clothed in the garb of a declaratory decree with a consequential relief, the Court is entitled to see what is the real nature of the relief and if satisfied that it is not a mere consequential relief but a substantive relief, it can demand the proper court fee on that relief, irrespective of the, arbitrary valuation put by the plaintiff in the plaint on the ostensible consequential relief. Obviously, the Full Beach did not intend to lay down that where the plaintiff deliberately omits to claim a consequential relief and contents himself with claiming a mere declaratory decree, the Court can call upon him to pay court fees on the consequential relief, which he should have claimed although he has omitted to do so. What was

held was that if the plaintiff does not ask for a mere declaratory decree but also asks for a relief which he calls "consequential" relief, the mere fact that he calls it so would not prevent the Court from demanding full court-fee, if in reality the additional relief claimed was a substantive relief and not a mere consequential relief. We do not think that the observation was intended to go further than this.

42. A perusal of the above-mentioned cases makes it abundantly clear that it is perfectly open to a plaintiff to frame his suit in such a manner so as to avoid a prayer for a consequential relief. Section 42, Specific Relief Act, enacts that: 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.

43. It appears to me that at the time when the question as regards the sufficiency or otherwise of the court-fee paid arises, the Court is fully competent to find out as to whether or not any consequential relief has been claimed in reality. If it finds that consequential relief has been claimed then certainly the plaintiff will be liable for payment of ad valorem court-fee. But if, on the other hand, the plaintiff deliberately takes care not to ask for a consequential relief then it is not the function of the Court to insist that the consequential relief should have been asked. Where consequential relief has been deliberately omitted, it would be wrong to say that a plaintiff should be deemed to have asked for that relief when he studiously refrains from asking it. It may be that later on the Court may come to the conclusion that it was a case in which a further relief than a mere declaration of title should have been asked. In that case the penalty is provided for by the proviso of Section 42, Specific Relief Act, which enacts that the Court may refuse to make a declaration. Whenever there is a case of this description it is always open to the Court to throw out the suit on the ground that "further relief than a mere declaration of title should have been asked for." A large number of defective suits are instituted but there is no law under which the 'duty of giving advice to a party instituting the suit has been imposed upon the Courts. A plaintiff putting forward a defective plaint does so at his own risk. I think that the correct view is that when a plaint is filed then what the Court has to see is whether it is a suit in which the plaintiff asks for a mere declaration without any consequential relief or whether he asks for a declaration with consequential relief. In the first case the Court cannot compel the plaintiff to pay more than Rs. 10 even if it is of opinion that the suit is defective because no consequential relief has been asked for. The Court is under the law bound to receive the plaint. The powers of a Court not to receive documents are defined in Section 6, Court-fees Act. If a plaint deliberately avoids any reference to consequential relief, then I do not see how having regard to the provisions of Section 6, Court-fees Act, the Court can refuse to admit the plaint. Under section 6, Court-fees Act, the Courts are enjoined among other things not to receive document insufficiently stamped. When a plaint in a declaratory suit is presented the Court has only to see whether in substance the plaint

is one on which an ad valorem court-fee has to be paid or only a duty of Rs. 10. The Court is under no obligation to insist on giving advice to the plaintiff presenting the plaint that he should amend his plaint so as to pray for a consequential relief. I further apprehend that the Court has no power to do so. The power of Courts in the matter of the rejection of plaints are governed by Rule 11, Order 7, Civil P.C. If it appears that the plaintiff's valuation is fictitious it can compel him to make it correct, and on failure to do so, it can reject it. In considering the question of sufficiency or otherwise of the court-fee to be paid, the Court is to confine its attention strictly to the provisions of the Court-fees Act, and there is no need to refer to the provisions of any other Act.

44. The important question for consideration is whether the two Full Bench rulings reported in *Kalu Ram v. Babu Lal* 1932 All 485(Supra) and in *Sri Krishna Chandra v. Mahabir Prasad* 1933 All. 488(Supra) lay down a contrary proposition. In my opinion they do not. I will first take up the Full Bench ruling in *Kalu Ram v. Babu Lal* 1932 All 485. That was a suit in which there was a clear prayer for the cancellation of an instrument and for the cancellation of a compromise and decree and therefore Section 39, Specific Relief Act, was clearly applicable. In that case the plaintiff also claimed a substantive relief though clothed in a garb of declaratory decree with a consequential relief. Two points were decided by that Full Bench ruling. One was that where a suit was for cancellation of an instrument under Section 39, Specific Relief Act, the relief was not a declaratory one and it fell neither under Section 7(4)(c) nor under Schedule 2, Article 17(3) but under the residuary Article, Schedule 1, Article 1. The other was that the Court was entitled to see what was the nature of the relief and if satisfied that it was not a mere consequential relief but a substantive relief, it can demand the proper court-fee on that relief irrespective of the arbitrary valuation put by the plaintiff in the plaint on the ostensible consequential relief. The question as to whether the Court could compel a plaintiff to sue for consequential relief when he had deliberately refrained from doing so was not before the Full Bench for consideration. On the other hand, from a perusal of the referring order in that case it would appear that it was one in which the frame of the suit included a prayer for consequential relief. This will appear from the following observations on p. 686 where it was remarked: The appellant has relied upon *Radha Krishna v. Ram Narain* 1931 All 369(Supra). But this ruling does not help him, as in that case the plaintiff sued for a mere declaration that a decree was not binding upon him and he deliberately omitted a prayer for cancellation of the decree. In the present case there is an express prayer for the cancellation of the decree : so the ruling has no application.

45. This being so I am unable to hold that the Full Bench ruling in *Kalu Ram v. Babu Lal* 1932 All 485(Supra) is an authority for holding that even though the plaintiff deliberately avoids seeking consequential relief he can nevertheless be compelled to add a prayer for a consequential relief so as to make him liable for payment of a higher court-fee. It appears to me that while a Court has full power to decide whether consequential relief has been sought by the plaintiff, it cannot compel the plaintiff to super add a prayer for consequential relief when he has not in fact asked for such a relief. I might state here that in this Full Bench case there are observations that a

relief to have a registered instrument adjudged void or voidable with the possible result of its being delivered up and cancelled and a copy of the decree being sent to the registration office for a note to be made by the registering officer in his book, is much more than a mere declaratory relief and that it is a substantial relief : Sri Krishna Chandra v. Mahabir Prasad 1933 All. 488, It appears to me however that the remarks made on this point in Kalu Ram v. Babu Lal 1932 All 485(Supra) are obiter dicta and are not binding on us. The reason is very obvious. It is important to bear in mind that the questions which were referred to a Full Bench in Kalu Ram v. Babu Lal 1932 All 485(Supra) were only these:

1. What provisions of the Court-fees Act determine the court-fee payable in respect of relief No. 1, i.e. that the mortgage deed in suit may be declared void and ineffectual as against the plaintiff and that it may be cancelled?

2. What provisions of the Court-fees Act determine the court-fee payable in respect of relief No. 2, i.e., that the specified compromise and decree may be cancelled.

46. Answers given by the Full Bench to these two questions were as follows : (1) Relief No. 1 is governed by Schedule 1, Article 1(2) Relief No. 2 is a consolidated relief (and not a distinguished relief) and it also falls under Schedule 1, Article 1. These were the only two points decided by the Full Bench in Kalu Ram v. Babu Lal 1932 All 485(Supra). The Full Bench was not called upon to decide the question as to whether a plaintiff who asks for a mere declaratory decree without consequential relief can be compelled to add a prayer for that consequential relief. This will be clear from the observations made by my Lord the Chief Justice in Sri Krishna Chandra v. Mahabir Prasad 1933 All. 488, where it was observed: Obviously, the Full Bench did not intend to lay down that where the plaintiff deliberately omits to claim a consequential relief and contents himself with claiming a mere declaratory decree, the Court can call upon him to pay court-fees on the consequential relief, which he should have claimed although he has omitted to do so. What was held was that if the plaintiff does not ask for a mere declaratory decree but also asks for a relief which he calls "consequential" relief, the mere fact that he calls it so would not prevent the Court from demanding full court-fee, if in reality the additional relief claimed was a substantive relief and not mere consequential relief. We do not think that the observation was intended to go further than this.

47. It therefore appears to me that the observations in Kalu Ram v. Babu Lal 1932 All 485(Supra) that in every case where the relief to have a registered instrument adjudged void or voidable is claimed, then it amounts to more than a mere declaratory relief are obiter dicta. The question whether a plaintiff is, asking for a mere declaratory decree without consequential relief or asks for a decree with consequential relief will depend on the allegations made in the plaint in each case and no general rule can be laid down which would cover all cases.

48. For the reasons given above, I would answer the two questions referred to the Full Bench as follows : Answer to question No. 1 : It is not open to a Court to treat the suit as one falling within the purview of Section 39, Specific Relief Act, if the plaintiff desires lit to be construed as one

under Section 42, Specific Relief Act. The plaintiff is at liberty to construe a suit as one under Section 42, Specific Relief Act. If on a perusal of the plaint the Court considers that it is one in which further relief should have been asked for, then it will refuse to grant a declaration. Answer to question No. 2 : Where the plaintiff deliberately seeks the relief of declaration and further deliberately avoids claiming consequential relief, such as the cancellation of an instrument, the court-fee on the plaint and the memorandum of appeal in the lower appellate Court should be Rupees 10 only in each Court under Article 17(3), Schedule 2, Court-fees Act, and not ad valorem court-fee on the value of the subject-matter.

Bennet, J.

49. This is a reference in regard to the court-fee paid by the plaintiff in the trial Court and as appellant in first appeal. The plaint sets out that the plaintiff is a minor and that plaintiff and his brother Komal formed a joint Hindu family owning four houses left by their father, and Komal executed two sale deeds of his half share in two houses without legal necessity, but that plaintiff is in possession of the houses. A declaratory court-fee of Rs. 20 was paid. The relief asked was:

(a) It may be declared that by virtue of the purchases made under the sale deed dated 24th October 1931, in favour of defendant 1, and under the sale deed dated 21st October 1931, in favour of defendant 2, which are null and void and ineffectual against the plaintiff and the joint family property, defendants 1 and 2 did not acquire any right to any part of the houses mentioned below.

(b)

50. The question raised is whether the plaint comes under Court-fees Act, Schedule 2, Article 17(3) as a plaint "to obtain a declaratory decree where no consequential relief is prayed" or whether it comes under the residuary Article, Article 1 Schedule 1, plaint "not otherwise provided for in this Act." In the former case a fee of Rs. 10 is sufficient for each declaration. In the latter case an ad valorem court-fee must be paid on the value of the subject-matter.

51. Two issues were framed by the referring order : (1) Where a plaint is so worded as to disclose a suit falling either under section 39 or Section 42 of the Specific Relief Act, is it open to a Court to treat the suit as one falling within the purview of Section 39, Specific Relief Act, if the plaintiff desires it to be construed as one under Section 42, Specific Relief Act? (2) Whether the court-fee payable on the plaint and the memorandum of appeal in the lower appellate Court in this case should be ad valorem on the value of the subject-matter, of Rupees 10 only under Article 17(3), Schedule 2, Court-fees Act?

52. The questions which have been argued concern the construction of Sections 39 and 42, Specific Relief Act, and how far this present Bench of three Judges is bound by the recent Full Bench rulings of five Judges in Kalu Ram v. Babu Lal 1932 All 485 and of three, Judges in Sri Krishna Chandra v. Mahabir Prasad 1933 All. 488. In the former case the first question referred

was:What provisions of the Court-fees Act determine the court-fee payable in respect of relief No. 1, i.e., that the mortgage deed in suit may be declared void and ineffectual as against the plaintiffs, and that it may be cancelled?

53. On p. 688 an earlier Full Bench ruling of five Judges was considered *Karam Khan v. Daryai Singh*¹⁷ and was overruled in the following words:The report of the case is very brief and the judgment is also very short. The original plaint in the vernacular is not available in this Court. If the learned Judges meant to lay down that a suit for cancellation of an instrument under the provisions of Section 39, Specific Relief Act, was a mere declaratory suit under Schedule 2, Article 17(iii), then with great respect we are unable to agree with that view. The only reported cases brought to our notice in which this ruling has been followed are *Hira Lal v. Wali Bhagat*¹⁸ and *Durga Bakhsh v. Mirza Mohamad Ali Beg*¹⁹. We may point out that the Full Bench ruling has been expressly dissented from by some of the other High Courts, vide *Samiya Mavali v. Minamma*²⁰ *Parvatibai v. Vishwanath Ganesh (1905) 29 Bom. 207(Supra)* and *Noowoagar Ojain v. Sridhar Jha 1918 Pat. 482.(supra)*

54. The ruling then proceeds to set out the two Sections, 42 and 39, Specific Relief Act, and contrasts them. Of Section 39 it is stated:It is equally clear that a plaintiff need only ask for the instrument to be adjudged void or voidable, and need not in express terms ask for it to be delivered up and cancelled.

55. It is to be noted that the ruling did not say that the amount of the court-fee depended on whether the plaintiff asked for cancellation or not; on the contrary, the ruling implies that asking for cancellation makes no difference even though no relief of cancellation is asked for, a Court may grant cancellation also.

56. When the ruling sums up the conclusion it does so without reference to a prayer for cancellation:A relief to have registered instrument adjudged void or voidable with the possible result of its being delivered up and cancelled and a copy of the decree being sent to the Registration Office for a note to be made by the Registering Officer in his books is much more than a mere declaratory relief. It is undoubtedly a substantial relief of a nature differing from a declaratory one.

57. The argument made for the plaintiff that this ruling only deals with a case where the plaintiff also asks for cancellation, and not with, a case like the present where cancellation is not asked for, appears to be incorrect, as the ruling shows that the fact that cancellation was asked for was treated as merely incidental and not as a determining factor. The ruling clearly distinguished any suit for having a written instrument adjudged void or voidable from a declaratory suit. The ruling proceeds to state:We may note that Section 39, Specific Relief Act, is in Ch. 5 which is headed : Of the cancellation of instruments.

58. Whereas there is a separate Ch. 6 headed "Of declaratory decrees." Obviously the legislature

intended to draw a distinction between a decree adjudging a written instrument void or voidable, which may result in its cancellation, and a mere declaratory decree. Though the Specific Relief Act was passed some years after the Court-fees Act, the distinction existed before the Specific Relief Act was passed and it cannot be said that for the purposes of the Court-fees Act a relief for adjudging an instrument void is of a declaratory nature. On p. 690 it is stated: In our opinion where a suit is for the cancellation of an instrument under the provisions of Section 39, Specific Relief Act, the relief is not a declaratory one. It falls neither under Section 7(iv)(c) nor under Schedule 2, Article 17(iii), but under the residuary article, Schedule 1, Article 1, Court fees Act. In *Sri Krishna Chandra v. Mahabir Prasad* 1933 All. 488(Supra) there was a decision by a Full Bench of three Judges, including the learned Chief Justice, in a case where no written instrument was concerned, but where the plaintiff asked for a declaration that a previous decree in suit, in which he was represented by a guardian, was not binding upon him. It was held that this was a suit for a mere declaratory decree and came under Schedule 2, Article 17(3). On p. 677 reference was made to *Kalu Ram v. Babu Lal* 1932 All 485(supra) and it was stated: On the other hand, there is no doubt that so far as suits relating to the cancellation of instruments are concerned, the Full Bench on p. 689 clearly held that a relief to have a registered instrument adjudged void or voidable with the possible result of its being delivered up and cancelled and a copy of the decree being sent to the Registration Office for a note to be made by the Registering Officer in his books, is much more than a mere declaratory relief. It is undoubtedly a substantial relief of a nature, differing from a declaratory one. It was clearly pointed out that it was not incumbent on a plaintiff to ask in express terms a relief for the instrument to be delivered up and cancelled and that he might merely ask for its being adjudged void or voidable. Nevertheless, a suit which falls under Section 39, Specific Relief Act, was held not to be a suit for obtaining a mere declaratory decree, but one for obtaining a substantive relief not otherwise provided for.

59. The following differences; between Sections 39 and 42 may be set out : (1) Section 39 is in Ch. 5 headed "Of the Cancellation of Instruments." Section 42 is in Ch. 6 headed "of declaratory decrees." If a suit under Section 39 was a suit for a declaratory decree, why was that section not included in the chapter on declaratory decrees? (2) Section 39 deals with written instruments, Section 42 does not refer to written instruments. Section 42 refers only to suits by a person to have a declaration of his title "to any legal character, or to any right as to any property." That is, Section 42 is for a declaration of the rights of the plaintiff. But Section 39 is for adjudication that a written instrument is void or voidable and that defendants derive no rights, from it. (3) 'Under Section 39 the Court, may order cancellation. There is no such result possible under Section 42.

60. Of the illustrations to Section 42(d) and (e) deal with cases where instruments are mentioned. In these cases a person with a limited interest makes an: alienation, and a reversioner may obtain a declaration that the alienation will be void beyond the life-time of the executant. But the alienation, is valid for the life-time of the executant and operates on the whole property for that period. Such a suit cannot come under Ch. 5 because there is no present right of the plaintiff to have the instrument adjudged void or voidable. The concern of the plaintiff is only with the

future and not with the present, and hence he is only entitled to a mere declaration and not to any substantive relief. These cases differ from those provided for in Section 40 which deals with an instrument which may be adjudged void or voidable at the time of suit as regards some of the rights and obligations under it and held good as regards others. The difference is that in the illustrations (d) and (e) to Section 42 there are no rights and obligations which can be adjudged void or voidable at the time of suit, only for the future can a declaration be granted that the rights, valid at the time of suit, will cease to exist on the happening of a certain contingency, the termination of the life of the executant.

61. In regard to the argument that illustration (f) may refer to an adoption by a Hindu widow evidenced by registered instrument, it is sufficient to say that the illustration does not mention any such instrument, and an adoption cannot be made by a written instrument but must be made by certain ceremonies. An instrument which merely recited that an adoption had taken place would not legally effect the adoption by such recital, Ch. 5 refers to instruments, meaning thereby legal documents which have a legal effect, and not mere statements. As regards illustration (c) where A covenants that if he in future becomes entitled to property exceeding one lakh of rupees, he will settle it upon certain trusts, it is not correct to argue that the covenant must be in a written instrument such as is contemplated by Ch. 5, and illustration (c) does not mention a written instrument. Another argument was that the Full Bench in *Kalu Ram v. Babu Lal* 1932 All 485 treated a decree as an instrument within the meaning of Section 39, Specific Relief Act. There were two questions referred to, the first dealing with cancellation of a mortgage deed, and only in regard to this is Section 39 mentioned. The second question dealt with the cancellation of a compromise and a decree, and the ruling begins to consider this second question on p. 690 from the words "as regards the second relief..." It is only in regard to the cancellation of the compromise that it is stated to be similar to the cancellation of the mortgage deed. The next paragraph considers the decree and says that "cancellation" is not the correct word, and the word should be "setting aside." No reference is made to Section 39 in regard to the decree.

62. I may note that it is incorrect to describe the reference as involving the question whether it is open to a Court to compel a plaintiff to ask for consequential relief if the plaintiff has asked for a mere declaration. Of course a Court cannot act in such a manner. No one has suggested that it could, and that is not the case for the learned Government Advocate, nor is that the question in the first issue referred to us. That question deals with the construction of the plaintiff as it stands, and whether it is for the Court or for the plaintiff to construe it. The contest is not one between a mere declaration without consequential relief and one with consequential relief. It is a contest between a mere declaration and a substantive relief. Another argument is that for the purpose of deciding whether the court-fee is sufficient or not the Court should confine its attention to the provisions of the Court-fees Act and should not refer to the provisions of any other Act. The Court-fees Act in Schedule 2, Article 17(3) fixes a court-fee for suit for "a declaratory decree where no consequential relief is prayed." But the Court-fees Act does not define what is a declaratory decree. Therefore it is necessary to refer to an Act which does define a declaratory

decree, that is the Specific Relief Act, to see whether the plaintiff asks for a declaratory decree.

63. In regard to the plaintiff's argument that cancellation must be asked for in the plaint, otherwise the suit is for a mere declaration, it is to be noted that if an instrument is adjudged void so far as the plaintiff is concerned, even, though there is no order that it be given up and cancelled, still the effect of the order is that, so far as the plaintiff is concerned, the instrument is cancelled and no longer exists. It is for this reason also that a suit under Section 39 is not a suit for a mere-declaratory decree. It may be pointed that if the plaintiff obtained a decree on his present plaint to the effect that the instruments were void, then the Court would undoubtedly order cancellation as the instruments would, serve no purpose whatever. The present is not a case such as mentioned in Section 40 where an instrument is evidence of different rights or different obligations, when a Court may cancel, part and allow the residue to stand.

64. The rule laid down in these two Full Bench rulings has been interpreted to cover a plaint where the relief is asked that a written instrument should be adjudged, void, although no relief of cancellation was asked, in *Suraj Ket Prasad v. Chandra* 1934 All. 1071. On p. 956 it is stated in the judgment delivered by the learned Chief Justice:

There is no doubt that the plaintiff in asking for a declaration that the compromise, dated 20th November 1919, was improper and void as against the plaintiff, was asking for the cancellation of the instrument.

65. And an ad valorem court-fee was payable under Section 1, Article 1. A similar view was, taken by Niamatullah, J., and by Collister, J., in *Akhlaq Ahmad v. Karam Elahi* 1935 All 207 as regards the particular plaint in that case which only asked for the sale deed executed by the plaintiff, a pardanashin woman, to be declared void and ineffectual against her on the ground that she did not mean to execute it. Collister, J., based his opinion on general grounds, (p. 137): It appears to me that the observations by the Full Bench in *Kalu Ram v. Babu Lal* 1932 All 485(Supra) though more or less obiter, since there was a prayer for cancellation, are authority for the proposition that a suit under Section 39, Specific Relief Act, for avoiding an instrument, even if there be no prayer for cancellation, carries with it by implication a prayer that the Court may further use the discretion given to it by Section 39, so as to order the said instrument to be delivered up and cancelled.

66. I do not think it is correct to describe the rule laid down by the Full Bench as "more or less obiter," because I consider that the Full Bench had jurisdiction to consider which of the factors in the case referred to them were the determining factors, and the Full Bench held that the relief of asking for the instrument to be adjudged void or voidable was the determining factor and not the relief of asking for cancellation : see p. 689: It is equally clear that a plaintiff need only ask for the instrument to be adjudged void or voidable and need not in express terms ask for it to be delivered up and cancelled.

67. Niamatullah, J., on the other hand held on p. 138: To my mind it is open to a plaintiff to sue for a declaration that a document is void or voidable without making it a suit falling within the purview of Section 39, Specific Relief Act. It may be that such a suit is, in certain circumstances, liable to be dismissed under the proviso to Section 42 of that Act on the ground that the plaintiff being, able to seek a further relief (e.g., cancellation) than a declaration, omits to do so.

68. The same view has been expressed by Niamatullah, J., and Rachhpal Singh, J., in *Abdul Samd Khan v. Anjuman Islamia Gorakhpur*²¹ This ruling referred to two decisions subsequent to the Full Bench decision in *Kalu Ram v. Babu Lal* 1932 All 485(Supra) which were mentioned as authority for the distinction on which the ruling was, based. These decisions were *Lakshmi Narain Rai v. Dip Narain Rai* 1933 All 350(Supra) and *Sri Krishna Chandra v. Mahabir Prasad* 1933 All. 488(Suupra) Both these rulings deal with cases where a declaration was asked for in regard to a decree, and it was held that such a declaration came under Schedule 2, Article 17(3). In the ruling *Sri Krishna Chandra v. Mahabir Prasad* 1933 All. 488 at p. 677(Supra) where the Full Bench considered the law relating to written instruments, the Full Bench relating in *Kalu Ram v. Babu Lal* 1932 All 485(Suupra) was interpreted in a sense contrary to the sense placed on it in, *Abdul Samd Khan v. Anjuman Islamia Gorakhpur* 1934 All 56(Supra) where it is confined to a case where the plaintiff sues for the relief of cancellation. It was held that the plaintiff not having sued for cancellation, but only for a "declaration" that a deed of gift by a third party to defendant 1 was illegal and ineffectual as against the plaintiff and that the defendants had no right to interfere with the possession of the plaintiff, the declaratory court-fee under Article 17(3), Schedule 2, was sufficient.

69. Learned Counsel for plaintiff also relied on *Arunachalam Chetty v. Rangaswamy Pillai* 1915 Mad. 948(Suupra), that was a case where a creditor obtained a decree on a hypothecation bond executed by the father of a joint Hindu family and the plaintiffs who were then minors as they alleged, sued for a declaration that the debt was not binding on the family and that the decree was a nullity, and for an injunction to restrain the defendant from executing the decree. It was held that mere declaratory court-fee under Schedule 2, Article 17(3) was not sufficient, and fee must be paid under Section 7(4)(c) for a declaratory decree with consequential relief. That case is distinguishable from those with which we have been dealing because in that case the mortgage had merged in the decree in the mortgage suit. With great respect to the learned Judges of this High Court who have "drawn this distinction between (1) a suit for "declaration" that a written instrument is void or voidable with an implication that the plaintiff wants cancellation, and (2) a suit for "declaration" that a written instrument is void or voidable if the plaintiff desires it to be construed as not asking for cancellation, the result being that ad valorem court-fees are due on (1) but not on, (2). I find that I cannot agree with this view and I think that this view is opposed to what has been laid down by the Full Bench of five Judges of this High Court in *Kalu Ram v. Babu Lal* 1932 All 485 (Supra) and I consider that the rule laid down there governs the present case. The rule that the Court has to construe such plaints and decide whether the plaint falls under (1) or (2) is a rule which would be highly artificial and difficult in practice. Moreover, the

rule appears to vary considerably, In *Akhlaq Ahmad v. Karam Elahi* 1935 All 207, at p. 138(Supra), it was stated that the Court had to construe the plaint for this purpose:In each case the question is one of construction of the plaint and of ascertaining the relief which the plaintiff is claiming.

70. But in the first question referred in the present case, the suggestion is that it is not open to the Court to construe the plaint for this purpose if the plaintiff desires it to be construed as one under Section 42, Specific Relief Act. For ascertainment of court-fee, rules ought to be clear and precise. The rule laid down by the Full Bench in *Kalu Ram v. Babu Lal* 1932 All 485 is quite clear and precise and can be understood by anyone, and easily applied. It was there laid down that if a suit comes under Section 39, Specific Relief Act, an ad valorem court-fee must be paid, and that it does not matter whether the plaint asks for cancellation or not. This rule is based on the essential distinction between suits under Section 39 and Section 42. Suits under Section 39 are not in Ch. 6 which treats of declaratory suits, and the word "declaration" is not used in Section 39. The words are "have it adjudged void or voidable."

71. Suits under Ch. 5 may perhaps result in a decree that the written instrument is void or voidable without an order for delivery and cancellation. But such a decree does in effect cancel the instrument so far as the plaintiff is concerned, and it appears that for this reason the second paragraph of Section 39 would always apply, and on making such an adjudication the Court should always send a copy of its decree to the registering officer where the instrument has been registered. The words used in this second paragraph are "the Court shall also send a copy of its decree to the officer," etc. The reason why this is always necessary is in order that anyone to whom the defendant offers to transfer the property should be able from a search in the registering office to ascertain that there had been a decree by which a Court had adjudged that the instrument did not affect the rights of a certain person. The first question referred may now be considered. The question postulates that a plaint may be "so worded as to disclose a suit falling either under Section 39 or Section 42, Specific Relief Act." I do not think that a suit can be so worded, because Section 39 deals with written instruments, and Section 42 does not. The cause of action for Section 39 is the execution of the written instrument. The cause of action for Section 42 is the denying or being interested to deny the plaintiff's title to some legal character or right. If the plaint is to come under Section 39 at all, it must ask the Court to adjudge that a written instrument is void or voidable. If it does ask that, then the plaint is clearly one under Section 39, and the addition of any other relief for a declaration under Section 42 would not alter its character as a plaint under Section 39. If the plaint does not ask the Court to adjudge a written instrument void or voidable, and if it is not necessary for the Court to do so in order to grant the relief for which the plaint asks, then the plaint does not come under Section 39. My first answer to question No. 1 is therefore that such a case could not arise.

72. As the question assumes that such a question could arise, I will proceed to answer it as a hypothetical case, in which it is assumed that a plaint could be so worded that the plaint could be

read as falling under Section 39 for adjudging a written instrument void or voidable, or under Section 42, for some other declaration without adjudging a written instrument void or voidable against the plaintiff. The reply to this hypothetical question is contained in Section 6, Court-fees Act: No document of any of the kinds specified as chargeable in Schedule 1 or 2 shall be filed, unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document.

73. Schedule 1 is headed "Ad Valorem Fees." Schedule 2 is headed "Fixed Fees." The last few lines, therefore mean "not less than either the ad valorem fee or the fixed fee." where the document would come under either Schedule. This section lays down for such a document that it must satisfy two minima, one under each Schedule. The fee of Rs. 10 complies with the rule that it is not less than that indicated by the second schedule. But how can it be said that it is not less than that indicated by Schedule 1? The fee must satisfy both schedules where the document can come under either. If the section had meant that it would be sufficient if the fee satisfied one schedule only, it would have stated: Unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said schedules, whichever is least, as the proper fee for such document.

74. It is not possible to read these words into Section 6 when the words are not there. Without these words the section clearly indicates that where a document comes under either schedule, the court-fees must not be less than what each schedule prescribes. There are no rulings on this section on this point, or at least none were produced. My second answer therefore to the hypothetical case question one is that Section 6, Court-fees Act, would apply, and as the word in that section is "shall," the Court and the plaintiff have no option and the court-fee under Section 39, an ad valorem court-fee, must be paid.

75. The second question deals with the present case and asks whether the plaint and memorandum of appeal in the lower appellate Court require an ad valorem court-fee or fixed fee. I consider that an ad valorem court-fee is required for the following reasons : (1) The present case is governed by the Full Bench ruling in Kalu Ram v. Babu Lal 1932 All 485. (2) A relief to have a written instrument adjudged void or voidable comes under Section 39, Specific Relief Act, and require an ad valorem court-fee under Article 1, Schedule 1, Court-fees Act. (3). It is immaterial whether the plaint asks for the relief of cancellation or not, because if adjudged void or voidable, the written instrument is cancelled so far as the plaintiff is concerned.

76. The first question referred to this Full Bench is answered in the negative. On the second question it is declared that the court-fee paid in the lower Courts was sufficient.

Cases Referred.

11931 All 369

21935 All 207

31932 All 485
41932 All 485
51933 All. 488
6(1883) 5 All 331
71932 All 560
81933 All. 488
91933 All 350
101925 Mad. 713
11(1912) 39 Cal 704
121928 Mad. 929
131925 Pat. 210
141931 All 369
151932 All 316
161932 All 485, at p. 690
17(1883) 5 All 331
18(1889) A.W.N. 124
19(1898) 1 O.C. 123
20(1900) 23 Mad. 490
211934 All 56