NAGPUR HIGH COURT

Vinayakrao Anandrao Mankar Kunbi

Vs

Mankunwarbai

(Vivian Bose, J.)

19.03.1942

JUDGMENT

Vivian Bose, J.

1. The question in this revision is whether the lower Court was right in demanding ad valorem court-fees for the plaint which prays as follows:

> That this Court be pleased to declare that the debts of defendants 1 to 13 and 15 to 21 are illegal and immoral debts and that they are not binding on this plaintiff or the joint family property, either in whole or in part as the ease may be.

2. The debts are set out in an earlier part of the plaint. They consist of decrees obtained against the plaintiff's father (defendant 14) by the other defendants. The question is whether consequential relief is implicit in this prayer though none has been expressly claimed, and whether consequential relief is a necessary consequence of the prayer. It is well settled that the taxing authority must look to the whole plaint and not merely to the form of the prayer. A plaintiff cannot evade payment of court-fees by clothing his relief in a form which would appear to seek no consequential relief if in fact consequential relief is actually involved and would ensue if the prayer, were to be granted. See for instance, *Mt. Roop Rani v. Bithal Das*[1], *Bepin Singh v. Bhagwan Singh*[2], *Mt. Zeb-Ul-Nisa v. Din Mohammad*[3], *Surendra Narain v. Shambihari Singh*[4], *Deokali Koer v. Kedar Nath*[5], *Arunachalam Chetty v. Rangasamy Pillai*[6], *Kalu Ram v. Babu Lal*[7], *Kamala Prasad v. Jagarnath Prasad*[8], *Dattaji Parashramji v. Mt. Bhagirathi*[9], and *Bhagwan Appa v. Shivappa*[10], That in no way controverts the principle I laid down as Taxing Judge in F.A. No. 87 of 1939 following *Radha Krishna v. Ram Narain*[11], But it must be remembered that a High Court is not in the same position as a lower Court. The taxing department of the High Court is quite separate from its judicial side. The Taxing Officer has no judicial powers except as regards the one matter of court-fees, nor has the Taxing (Judge. If, therefore, in an appeal to the High Court the appellant insists that he wants a declaration only and nothing more the taxing authorities cannot decide whether such a suit will lie. All they can say is that the court-fees payable on a relief for a declaration simpliciter

[1] A.I.R. 1938 Oudh 1
[2] A.I.R. 1938 Oudh 201
[3] A.I.R. 1941 Lah. 97
[4] A.I.R. 1922 Pat. 404
[5] 39 Cal. 704
[6] A.I.R. 1915 Mad. 948
[7] AIR 1932 All 485 : (1932) ILR 54 All 812
[8] A.I.R. 1931 Pat. 78
[9] A.I.R. 1938 Nag. 183
[10] A.I.R. 1927 Nag. 248
[11] AIR 1931 All 369 : (1931) ILR 53 All 552

is a certain figure and they must leave the wider question of consequential relief to the Judge deciding the appeal ion the judicial side.

3. But even there the taxing authority can decide whether the relief sought is in fact a declaration simpliciter or whether consequential relief is implicit in it. If there is any doubt, the Taxing Officer, or the Taxing Judge when the matter is referred to him, can insist on amendment of the prayer and the memorandum of appeal so as to leave no doubt as to what is being agitated in appeal. Once that is done, then the Judge hearing the appeal decides whether the suit so framed can lie. The taxing authorities cannot do it. All they can do is to fix the court-fee payable on the assumption that a declaration simpliciter is all that is asked for. In the lower Courts, the patter is different. Theoretically of course there is the same clear-cut distinction, but as the same Judge discharges both functions his actions in the one capacity and the other often mingle to such an extent that the distinction becomes blurred and almost disappears. I will give two illustrations. (i) A, a member of a joint Hindu family sues B for partition. If A has been totally excluded from possession then on the Nagpur view ad valorem court-fees are payable. The Judge considers whether he has been so excluded and finds that he has. He then demands ad valorem fees. In so deciding he discharges two functions. The decision on the question of fact, namely, whether or not A has been excluded is judicial. The other decision that ad valorem court-fees are payable is as a taxing authority. But the same Judge decides both questions and frequently does so in the same proceedings at one hearing and under one order, (ii) A, a Hindu widow, obtains a decree against B for maintenance, and the decree creates a charge over Blackacre. c, a subsequent purchaser from B, sues for a declaration that the charge does not bind him because he purchased in good faith and without notice.

4. Whether consequential relief is here involved would depend upon a further fact. Does A want the decree to be amended or not? If he has not made that clear then he can be called upon-to do so. If he states plainly that he seeks no amendment of the decree then no consequential relief is involved and no ad valorem court-fees need be paid. The Judge as a taxing authority would so decide. The matter would then go to trial and the Judge acting in a judicial capacity would next decide whether such a suit can lie. That would depend upon whether that decree was merely declaratory or whether it was executable. See *Seth Ghasiram v. Mt. Kundanbai*[12], and *Ahsan Hussain v. Maina*[13], where the difference is brought out. If the decree is not executable then a transferee in good faith would not be bound by the charge and in that event no modification would be necessary. But if, on the other hand, it was executable then the transferee would be bound and so before he could succeed it would be necessary for him to have that decree modified in such a way as to exempt him from its operation. Now it is plain that a simple question like that involving the construction of a former decree would normally be decided then and there along with the court-fee question in the lower Court. But that would not be possible in the High Court. The position in the present case is much the same. The real question is, is the son bound by the decree against his father? If he is not bound, then it is not necessary for him to have the decree modified. If however he is bound then consequential relief

[12] AIR 1940 Nag 163

[13] A.I.R. 1938 Nag. 129

is implicit in the prayer. Ordinarily a decree only binds parties and privies. One who is not a party and who does not claim through the judgment-debtor is not bound, and if he is not bound it is not necessary for him to get the decree modified or set aside in order to protect his interests. But if for one reason or another he is bound then there is implicit in the declaration a prayer that

the former decree be modified so as to exonerate his interests.

5. Whether the son is bound or not depends upon the facts. I pointed out in *Madhodas v. Gangabai*[14], that it would appear from certain decisions of their Lordships of the Privy Council that in most cases the presumption is that the sons are bound and that it is necessary for them to prove the contrary. It is obvious that when they are not parties they can only be bound on the assumption that though not parties they are deemed to have been either parties or privies because their father, or the manager, is prima facie deemed to have been sued in a representative capacity. Naturally, such a presumption cannot be drawn in every case, The rule is limited to cases where a prima facie inference of that kind is possible. It is true that the son is in a special position and can challenge the decree in so far as it affects his interests even in execution, see *Narayan v. Co-operative Central Bank, Malkapur*[15], but that is for a special reason. The whole question in my opinion hinges on this. Can the son in execution say "I was not a party to the decree and I am not a privy and so it cannot be executed against me." Would that be enough or must he go on to prove something more? If he need do nothing more then it is not necessary for him to have the decree modified or set aside. If he must, then modification is implicit in the relief sought and that is consequential relief. The answer to this question depends upon the proper interpretation of the Privy Council decisions I re, ferred to in *Madhodas v. Gangabai, A.I.R. 1935 Nag. 14(SUPRA)*. The matter has since been considered by a Full Bench of the Madras High Court in *Venkatanarayana Rao v. Samaraju*[16], and the conclusion reached (see p. 890) was that the Privy Council cases establish two principles:

> First, that the managing member could effectively represent the entire family and that a decree passed against him would be binding upon all the members, and secondly, that it is not necessary that it should be stated in the pleadings in express terms that he is suing or is being sued as such manager: the suit will be deemed to have been brought by or against him in his representative character if the circumstances of the case show that he is the manager of the family and the properly involved is the family property.

6. In *Khiarajmal v. Daim*[17], the Privy Council state that it is elementary that a Court has no jurisdiction to sell the property of persons who were not parties to the proceedings or properly represented on the record. But at p. 314 they point out that:

> The Indian Courts have properly exercised a wide discretion in allowing the estate of a deceased debtor to be represented by one member of the family, and in refusing to disturb judicial sales on the mere ground that some members of the family, who were minors, were not made parties to the proceedings, if it
> appears, etc.

[14] A.I.R. 1935 Nag. 14
[15] A.I.R. 1938 Nag. 434
[16] A.I.R. 1937 Mad. 610
[17] 32 Cal. 296

7. and said that these are usually cases where the person named as defendant is de facto manager of a Hindu family property.

8. In a later case *Lingangowda v. Basangowda*[18], their Lordships said:

> In the case of a Hindu family where all have rights, it is impossible to allow each member of the family to litigate the same point over and over again and each infant to wait till he becomes of age, and then bring an action, or bring an action by his guardian before; and in each of these cases therefore the Court looks to the Explanation 6 of Section 11, Civil Procedure Code, to see whether or not the leading member of the family has been acting either on behalf of minors in their interest, or if they are majors, with the assent of the majors.

9. In *Bissessur Lall Sahoo v. Luchmessur Singh*[19], sales made in execution of decrees for arrears of rent against various representatives of a joint Hindu family were upheld and their Lordships appear to have decided that once it is shown that the family is joint and that the property was joint family property it will be assumed until the contrary is shown that the person sued was sued as a representative of the family and that therefore the decree binds the family. The learned author of Edn. 10 of Mayne's Hindu Law says in foot-note (t) to page 386 that if the other members are not satisfied with the prosecution of the suit they can always apply to be made parties and ordinarily the Court would join them. These were all cases in which the decree was obtained against the manager, or as in the last case cited, against the person who was assumed to be the representative of the family. I think the position is much stronger when the person sued is the father because then the only ground which the sons can urge is that the debt was avyawaharik. Here, in addition it is admitted in the plaint that the father was the manager. In my opinion, the general conclusion from all these cases is that when the circumstances indicate that the person sued was sued in a representative capacity the others are bound because they are deemed, until this contrary is shown, to have been represented by the judgment-debtor and are thus deemed to have been constructive parties to the suit. Once that position is reached then it is clear that they are bound by the decree and that it can be executed against their shares in the joint family property unless and until they get the decree modified or set aside as against them. This they can do by a separate suit though they have in certain circumstances also been allowed to do so in execution. But if they choose to sue, then consequential relief is implicit in the prayer and consequently ad valorem fees must be paid.

10. Of the cases cited on behalf of the applicant *Lallo Prasad v. Sahebdin Singh*[20], is the only one which has any relevance though, in my opinion, that can also bo distinguished. The other cases all deal with private transfers such as sale and gift and mortgage. It is well established that before an alienee can succeed against a person not a party to the transfer he must establish that the transfer binds the person so proceeded against for this reason or that. He must show either legal necessity, or express authority or antecedent debt, or something of that kind. If he neither alleges nor proves one or other of these matters his case fails except against his actual

[18] A.I.R. 1927 B.C. 56 [20] AIR 1934 Oudh 212

[19] 5 C.L.R. 477

transferor or transferors. That means that prima facie the transfer does not bind those who are not parties to it and therefore they need not get the deed amended or cancelled as against them. Consequently a mere suit for a declaration lies. The matter is otherwise if the transfer is binding unless and until some further step is taken. That however is not the case with decrees. If I read the rulings I have cited above aright there is a presumption in most cases that the father or the manager represented the family and therefore they are all deemed to Shave been constructive

parties. If they are parties, whether by reason of a fiction or otherwise, the decree binds them unless and until it is amended, and the burden of getting it corrected lies upon the sons. Consequently consequential relief is involved. I need not for this reason expatiate further upon *Bishan Sarup v. Musa Lal*[21], and *Ma Wa Nu v. Ma Than*[22], The one was the case of a sale and the other of a gift. The plaintiff in each case was not a party to either transaction. So also *Shamdas v. Charn Das*[23], That was a case of a mortgage.

11. As regards the cases dealing with decrees in the Privy Council case in *Brij Narain v. Mangala Prasad*[24], the subsequent suit was to set aside the previous decree and so the case is either not in point because this question was not considered or, so far it goes, it is against the applicant because consequential relief was admittedly sought. This does not appear clearly in the report of the proceedings given in A.I.R. 1924 P.C. 50 though there is a sentence at p. 96 which shows that the decree in the former suit was set aside by the trial Judge. But the matter is placed beyond doubt in *Brij Narain v. Mangala Prasad, AIR 1919 Allahabad 324 : 50 Ind. Cas. 101(SUPRA)* which is the report of the proceedings in the High Court before appeal to His Majesty in Council. In the Pull Bench case in *Ganga Saran v. Ganeshi Lal*[25], the present question was not raised and we do not know what court-fee was paid. It is true the claim is described as one for a declaration at p. 452 but it will be recollected that that was also the way in which the claim in *Brij Narain v. Mangala Prasad A.I.R. 1924 P.C. 50(SUPRA)* was described though in truth and in fact something more was also sought, namely the setting aside of the decree. In the Pull Bench also something more than a mere declaration seems to have been given. The decree was against the joint family property of the plaintiffs and their father and the Pull Bench held:

> We hold...that it is not open to the defendants to execute the decree...against the joint family property of the plaintiffs.

12. But however that may be, the present question was neither raised nor decided and so this case is not an authority either way. In *Alam Khan v. Mt. Bhag Bhari A.I.R. 1941 Lah. 159* (SUPRA)the facts were that A sued B for a declaration that he was the adopted son of B's deceased husband. Thereafter C, a reversioner in the absence of A, sued A and B for a declaration that that decree did not bind him because it had been obtained collusively and fraudulently. Tek Chand J. held that c was not a party actually and he could not be deemed to have been a party constructively because the widow's interests were adverse to him. Whether that was so hardly matters because the basis of the decision so far as court-fees are concerned was that A was neither actually nor constructively a party. Once that position is reached, then the rest follows but here, in

[21] AIR 1935 All 817 : 1935 AWR (H.C.) 896
[22] A.I.R. 1941 Bang 269
[23] A.I.R. 1925 Lah. 90
[24] A.I.R. 1924 P.C. 50
[25] AIR 1939 All 225 : 1939 AWR (H.C.) 9 234

my opinion, the sons must be deemed to have been parties and therein lies the difference. As regards the cases cited by the other side, the Full Bench in *Alam Khan v. Mt. Bhag Bhari, A.I.R. 1941 Lah. 97(SUPRA)* is in point. It was a case in which the plaintiff was not a party to the former decree and though he asked for a mere declaration it was held that consequential relief was involved. The learned Judges there applied the test laid down by Sir Lawrence Jenkins in *Deokali Koer v. Kedar Nath*[26] and said that the question does not depend upon whether or not the plaintiff was a party to the former decree but whether or not the relief claimed comes under Section 42, Specific Belief Act. That is possibly another way of putting it though with respect it

seems to me that the crucial test is whether or not the plaintiff is bound by the former decree unless and until it is modified or set aside as against him. Of course the matter must fall within Section 42 if a suit for a declaration is to lie, but it seems to me that a suit of this kind is covered by the words "entitled to any legal character or to any right as to property." The suit, as I see it, deals directly with the plaintiff's rights to property. It is not that which, in my opinion, stands in the plaintiff's way here. It is the proviso:

> 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.

13. In my opinion, the plaintiff here not only can, but does seek further relief, namely amendment of the decree, not, it is true, in express terms, but it is implied in his prayer and is a necessary consequence of it. I think this case is much more nearly akin, so far as the ratio decidendi is concerned, to *Dattaji Parashramji v. Mt. Bhagirathi*[27] where the Division Bench hold that the plaintiff could not get what he wanted without amendment of the decree. The test, as I see it, is to ascertain whether or not the plaintiff is bound by the decree and that in turn depends upon whether the decree is executable against the plaintiff as it stands. If the plaintiff does nothing more, can the decree-holder proceed against him, or is there a burden cast on the plaintiff to exonerate himself in some way? For the reasons given, I am of opinion that the decree in this case is executable against the plaintiff's share in the joint family property unless and until the plaintiff does something to get it modified. The following are cases in which the plaintiff was not a party to the decree and in which it was held that nevertheless consequential relief was involved: *Surendra Narain v. Shambihari Singh A.I.R. 1922 Pat. 404(Supra) Mt. Zeb-Ul-Nisa v. Din Mohammad, AIR 1941 Lahore 97(Supra).*

14. As regards the other Oudh case on which the applicant relies, namely *Lallo Prasad v. Sahebdin Singh, AIR 1934 Oudh 212(supra)* the plaintiff's case there was that the father had only a life interest in the property and that therefore the decree against the father was void against the plaintiff. If that was the fact, then it was not the kind of case which I have been considering because quite clearly the father did not and would not have represented the plaintiff. As I have said, the question must always be was the father sued in a representative capacity?" If he was the manager of the family and the property in suit was joint family property, then, in my opinion, he is deemed to have been sued in that capacity until the contrary is shown, but whether

[26]39 Cal. 704

[27] A.I.R. 1938 Nag. 183

that is so or not depends upon the circumstances in each case. If, for example, the allegation is that the property was the self-acquired property of the son, then I think a suit for a mere declaration would lie. Whether such an allegation is true or false cannot be considered at the court-fee stage. As the learned Oudh Judges point out the Court is only concerned with the allegations in the plaint at that stage (read possibly in the light of other pleadings in certain exceptional cases), and it must for the purposes of court-fees act on the assumption that the allegations are true. If they are later found to be false the plaintiff either loses his case or is allowed to amend, and if he is permitted to amend, the question of court-fees consequent on the amendment is considered afresh. It is to be observed that Shrivastava J. was a member of the Bench in both the Oudh cases and so presumably there must, in his opinion, have been some point of distinction between them.

15. On the allegations made in this case, namely, that the judgment-debtor was the plaintiff's father, that he was the manager of the family, that the decrees were against him, and that joint family property is involved, the plaintiff is, in my opinion, bound by the decrees to the extent of the joint family property and, in my opinion, they can be executed against his interest in that property unless and until he, in some way, gets the decrees set aside or modified so far as they affect his interest. The father will prima facie be deemed to have been sued in a representative capacity because it is a family duty (as between him and his sons) to pay off his debts unless they are avyawa-harik. The burden of showing that they are lies upon the sons. Therefore until that is shown the sons' interests are bound and the sons are to that extent deemed to have been constructive parties to the decree. Consequential relief is therefore implicit in the prayer and therefore ad valorem court-fees must be paid. In fact the proper course, if the sons succeed, would be for the decree to be sent for and to be actually amended and turned into the sort of decree which would have been passed had the sons been actually parties to the former case. In my opinion, strictly speaking, it is desirable that such a relief should always actually be insisted on. The application for revision fails and is dismissed with costs. Counsel's fees, L 15 for non-applicant 1, L 40 for non-applicants 2 and 3, L 20 for non-applicants 9 to 13 and 15 to 21.
Application dismissed.