

Baldeo Singh Raghuraj Singh Vs. Gopal Singh Raghuraj Singh and ors.

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Court : Madhya Pradesh

Decided On : Jan-21-1966

Reported in : AIR1967MP221

Judge : V.R. Newaskar, ;T.P. Naik and ;Shiv Dayal, JJ.

Acts : [Court Fees Act, 1870](#) - Sections 1 and 7 - Schedule - Article 17; Hindu Law; Specific Relief Act, 1877 - Sections 39 and 42; [Specific Relief Act, 1963](#) - Sections 31 and 34

Appeal No. : First Appeal No. 20 of 1961

Appellant : Baldeo Singh Raghuraj Singh

Respondent : Gopal Singh Raghuraj Singh and ors.

Advocate for Def. : R.S. Dabir, Adv.

Advocate for Pet/Ap. : G.P. Singh and ;L.S. Baghal, Adv.

Judgement :

Naik, J.

1. The plaintiff-appellant, a minor, filed, a suit, through his next friend Durga Vinod Singh, for a declaration that the sale-deed, dated 28-8-1959, executed by his eldest brother, Gopal Singh (respondent No. 1) as the karta of the joint Family,

consisting of himself and his brothers, viz., Raj Bahadur Singh and the minor plaintiff Baldeo Singh, was void, as it was not executed for legal necessity or for the benefit of the estate. It was also averred in the plaint that the suit property in respect of which the declaration was sought was in possession of tenants, who had not yet attorned to the vendees; nor had the defendants-vendees been able to obtain possession of the suit property from the tenants in any other way. It was also pleaded, in the alternative, that as the plaintiff was a minor and as the permission of the Court had not been obtained in accordance with the Hindu Minority and Guardianship Act, 1956, the sale-deed in question was void in any case to the extent of the share of the plaintiff-appellant. In the result, the plaintiff claimed the following reliefs:

1- The suit was contested by the defendants Nos. 4 and 5, the alienees, inter alia, on the ground that the plaint was insufficiently stamped, as the plaintiff was liable to pay ad valorem court-fees on the plaint as framed.

2- The trial Court, by its order dated the 28th of March 1960, held that the court-fee was payable under Article 17 (iii), Schedule II of the Court-fees Act and not under Section 7(iv)(c), because the suit was not for the cancellation of the sale-deed but only for a declaration simpliciter that the sale-deed was void or partly void to the extent of the share of the plaintiff. It relied on the observations in *Ratansingh v. Raghurajsingh*, ILR (1945) Nag 975: (AIR 1946 Nag 30) to the effect that 'Court-fee is payable on the claims as framed in the plaint and not on the claim as it ought to be framed'. After the aforesaid finding, the parties went to trial. The learned Additional District Judge, by his judgment under appeal, held that the sale-deed executed by Gopal Singh as the Karta of the joint family, of which the plaintiff-appellant was a member, was neither for legal necessity nor for the benefit

3- The suit was contested by the defendants Nos. 4 and 5, the alienees, inter alia, on the ground that the plaint was insufficiently stamped, as the plaintiff was liable to pay ad valorem court-fees on the plaint as framed.

3. The trial Court, by its order dated the 28th of March 1960, held that the court-fee was payable under Article 17 (iii), Schedule II of the Court-fees Act and not under Section 7(iv)(c), because the suit was not for the cancellation of the sale-deed but only for a declaration simpliciter that the sale-deed was void or partly void to the extent of the share of the plaintiff. It relied on the observations in *Ratansingh v. Raghurajsingh*, ILR (1945) Nag 975: (AIR 1946 Nag 30) to the effect that 'Court-fee is payable on the claims as framed in the plaint and not on the claim as it ought to be framed'. After the aforesaid finding, the parties went to trial. The learned Additional District Judge, by his judgment under appeal, held that the sale-deed executed by Gopal Singh as the Karta of the joint family, of which the plaintiff-appellant was a member, was neither for legal necessity nor for the benefit

of the estate. He, therefore, held that the minor plaintiffs share in the suit property could not have been sold by Gopal Singh and that the transfer to the extent of his share was void.

He, however, in spite of the aforesaid finding, dismissed the suit because the plaintiff had not prayed for a consequential relief which, in the opinion of the trial Court, it was necessary for him to have claimed in view of the provisions of Section 42 of the old Specific Relief Act. It would be observed that though the plaintiff had claimed that the sale in question being neither for legal necessity nor for the benefit of the estate was void in its entirety because he was governed by the Benaras School of Mitakshara Laws administered in the Uttar Pradesh where, in such circumstances, the alienation is liable to be set aside wholly, the trial Court was inclined to the view, subject of course to its non-maintainability because of the bar created by Section 42 of the Specific Relief Act, that the sale was void only to the extent of the plaintiff's share.

4. Against the aforesaid judgment and decree, the plaintiff has filed an appeal in this Court praying, inter alia, that the Court below should have held that the parties being governed by the Benaras School of Hindu Law as administered in the Uttar Pradesh, the entire sale and not only the plaintiffs share in it was void and not binding on the joint family. In view of the aforesaid prayer, the learned counsel for the respondents contended as a preliminary objection to the maintainability of the appeal that the court-fee paid on the memorandum of appeal as also on the plaint was improper and that the plaintiff-appellant should be required to pay ad valorem court-fee before the appeal was heard.

5. In my opinion, the preliminary objection raised by the learned counsel for the respondents cannot be accepted. In ILR (1945) Nag 975: (AIR 1946 Nag 30) (supra), a Division Bench of this Court laid down: (i) that the Court-fees Act is a fiscal enactment and has, therefore, to be construed strictly and any ambiguity or doubt arising out of its interpretation has to be resolved in favour of the subject, (ii) That court-fee is payable on the claim as framed in the plaint and not on the claim as it ought to be framed, (iii) That the question of court-fee is distinct and separate from the question of the maintainability of the suit as framed. Adverting to the

question of court-fee payable on suits for setting aside a deed or a decree, it said that no specific provision has been made in the Court-fees Act for valuing such suits; but several tests have been formulated by judicial decisions for determining whether court-fee is payable under Section 7(iv)(c) or Article 17 (iii), Schedule II of the Court-fees Act. Some of these tests are: (a) Whether a person was a party actual or constructive to the deed or decree; *Mt. Rup Rani v. Bithal Das*, ILR 13 Luck 628: (AIR 1938 Oudh 1 (FB)), and *Vinayakrao v. Mankunwarbai*. ILR (1943) Nag 440: (AIR 1943 Nag 70). (b) Whether a suit is one under Section 42 of the Specific Relief Act, because if that were so, then the court-fee payable is under Article 17 (iii) *Bepin Singh v. Bhagwan, Singh*, ILR 14 Luck 176: (AIR 1938 Oudh 201 (FB)). (c) Whether it is necessary for the plaintiff to have the deed set aside or the decree amended because in that case in order to make the relief of declaration effective it would be necessary for the plaintiff to ask for some consequential relief, thus attracting the provisions of Section 7(iv)(c): *Dattaji Parash-ramji Patil v. Mt. Bhagirathi*, ILR (1939) Nag 373: (AIR 1938 Nag 183) and ILR 1943) Nag 440: (AIR 1943 Nag 70) (Supra), (d) Whether the plaintiff alleged that the deed or the document in respect of which he seeks relief is a nullity and void, because if the deed were a nullity and void, the simple declaration would be enough and no consequential relief need be asked for the simple reason that there is no need for setting aside that which has no existence in the eyes of the law; but if the transaction was not a complete nullity in that sense, and was valid and operative until avoided, then consequential relief is involved, because the prayer then is for the removal of a burden legally created: *Madanlal v. Shri Ramchandra Dewasthan*, (1936-43) Taxing Decisions of Nag H. C. p. 36; *Banku Behari Shaha v. Krishto Gobindo Joardar*, ILR 30 Cal 433; *Petherper-mal Chetty v. Muniandy*, 35 Ind App 98 (PC) and *Ramautar Sao v. Ram Gobind Sao*, ILR 20 Pat 780:(AIR 1942 Pat 60).

6. Bearing in mind the principles that court-fees are payable on the plaint as framed and not on a plaint as it ought to have been framed and that the question of court-fees is distinct and separate from the question of the maintainability of the suit, I am of opinion that it would be for the plaintiff-appellant to decide whether he would only claim a relief of declaration or he should also claim such other reliefs, consequential or otherwise, to which he is also entitled. If the relief of declaration

be the only relief claimed by him, he would be required to pay court-fees on such a relief only, even though on such a relief only being claimed, the suit may become otherwise non-maintainable.

7. Under the proviso to Section 42 of the old Specific Relief Act, a suit for a declaration is not maintainable if the plaintiff being able to seek further relief than a mere declaration of title omits to do so' and under Section 7(iv)(c) of the Court-fees Act 'to obtain a declaratory decree or order where consequential relief is prayed' court-fees are payable on the amount at which the plaintiff values the relief sought. It is also settled law that for the purpose of determining whether the suit is really one for a declaration simpliciter or for a declaration with consequential relief, the plaint has to be read as a whole, Any camouflage attempt in words to disguise a specific relief claimed in the garb of a suit for a declaration without a consequential relief cannot help the plaintiff. It was pointed out in Ratansingh's case, ILR (1945) NAG 975: (AIR 1946 Nag 30) (supra) that--

'In order to decide whether a suit is governed by Section 7(iv)(c) or by Article 17 (iii) Schedule II of the Court-fees Act, one must look to the substance and the nature of the claim and not to the language or the form in which the relief claimed is framed'.

ILR (1939) Nag 373: (AIR 1938 Nag 183) (supra); ILR 1943 Nag 440: (AIR 1943 Nag 70) (supra); Mt. Zeb-ul-Nisa v. Din Mohammad, ILR (1941) Lah 451 at p. 466: (AIR 1941 Lah 87 at p. 99 (FB); Kalu Ram v. Babu Lal, ILR 54 All 812 at p. 822: (AIR 1932 All 485 at p. 487) (FB); Arunachalam Chetty v. Rangaswamy Filial, ILR 38 Mad 922 at p. 926: (AIR 1915 Mad 948 at p. 950) (FB); ILR 13 Luck 628: (AIR 1938 Oudh 1) (FB) (supra); ILR 14 Luck 176: (AIR 1938 Oudh 201) (FB) (supra); Mt. Rupia v. Bhatu Mahton, ILR 22 Pat 783 at p. 799: (AIR 1944 Pat 17 at pp. 23-24 (FB)' [Pages 988-989 (of ILR Nag): (at pp. 35-36 of AIR).]

7A. However, as the Courts are not concerned with the wisdom or the propriety of the suit or appeal, they cannot insist how the suit or appeal shall be framed, At best, as suggested in Manoharsingh v. Patmeshari, ILR (1949) (SIC) 66 at p. 73: (AIR 1949 Nag 211 at pp. 213-214), the courts may point put that having regard to the nature of the claim the plaintiff ought to claim a further relief of possession as

consequential and if he does not do so his suit might fail under Section 42 of the Specific Relief Act; *Md. Ismail v. Liyaqat Hussain*, AIR 1932 All 316, and then if would be for the plaintiff to decide whether he will amend the plaint and seek further relief as suggested or face the possibility of the suit being dismissed under Section 42 *ibid*.

8. The fact, however, that the plaintiff has not claimed consequential relief, which was claimable by him either because it was implicit on a fair reading of the plaint as framed or because the relief prayed for itself involved a consequential relief, even though not asked, to make the declaration effective, shall not affect the question of court-fees, though it may affect the maintainability of the suit because of the provisions of section 42 of the Specific Relief Act.

9. In the instant case, the plaintiff-appellant is content with a declaration only--the fact that not being content with the declaration that the sale-deed in suit was ineffective as against him. he was now seeking a declaration in this appeal that it was wholly void or ineffective as against the joint family also, does not alter the character of the relief being a declaratory one. The court-fees paid thereon are thus proper.

10. The trial Court has, because of the provisions of Section 12 of the Specific Relief Act, dismissed the suit as not maintainable. The appellant, it appears does not accept this finding. If on appeal we uphold that finding, that would be the end of the appeal unless of course the plaintiff-appellant applies for the amendment of the plaint and is allowed to do so.

11. The appeal shall now be heard on merits,

Shiv Dayal, J.

12. For the respondents a preliminary objection is raised. Shri Dabir, relying on the dicta in ILR (1945) Nag 975: (AIR 1946 Nag 30) and *Comolata Dutta v. Ishwar Industries Ltd.*, 1964 MPLJ 553: (AIR 1966 Madh Pra 169) argues that the pic-sent case falls under Section 7(iv)(c) of the Court-fees Act, so that court-fee paid in this Court as also in the Court below is deficient.

13. It is alleged in the plaint that the plaintiff and defendants 1 and 2 are brothers and members of a joint Hindu family; that they are governed by the Bevaras School of the Mita-kshara Hindu Law as administered in Uttar Pradesh; that defendant 1 sold the suit property by a registered deed of sale for Rs. 13,000 that the sale is without legal necessity or for benefit of the estate and is wholly void; and, alternatively, that the said sale has no adverse effect on the rights of the plaintiff. The following declaration is claimed:

'(a) That the sale deed is wholly ineffective in law and void,

or

(b) Alternatively, that the sale is ineffective and void as against the plaintiff's share in the suit property.'

14. The trial Judge has held that the plaintiff being not in possession, was bound to claim a decree for possession as a consequential relief and that in its absence the suit is not maintainable.

15. While hearing the preliminary objection, we asked Shri G. P. Singh whether he was prepared to delete the declaration (a) above, and was satisfied with the declaration (b). Learned counsel insisted on retaining the relief Clause (a) as well as (b). In other words, the plaintiff insists that the sale deed is not only ineffective as against his share, but must be avoided in toto.

16. In ILR (1945) Nag 975: (AIR 1946 Nag 30) (supra), the following question was referred by the learned single Judge:

'Does not a suit brought by the legal representatives of the deceased debtor who is a party to an agreement registered under the Debt Conciliation Act having the force of a decree to have that 'decree' made unenforceable against him require an ad valorem court fee stamp?'

While dealing with that question, the Division Bench has stated certain principles:

'The Court-fees Act is a fiscal enactment, has to be construed strictly and any ambiguity or doubt arising out of its interpretation has to be resolved in favour of

the subject.

Court-fee is payable on the claim as framed in the plaint and not on the claim as it ought to be framed. The question of Court-fee is distinct and separate from the question of the maintainability of the suit as framed

'In order to decide whether a suit is governed by Section 7(iv)(c) or by Article 17 (iii), Schedule II of the Court-fees Act, one must look to the substance and the nature of the claim and not to the language or the form in which the relief claimed is framed.'

After citing certain decisions, the tests formulated in them were summed up: (1) Where a person was a party actual or constructive to the deed or the decree, court-fee is payable under Section 7(iv)(c). (2) If it is a suit for a bare declaration, court-fee is payable under Article 17 (iii). (3) 'If in order to make the relief for declaration effective it is necessary for the plaintiff to ask for some consequential relief, then in that case it is governed by Section 7(iv)(c)'. (4) A case of a declaration that the deed or the document in respect of which he seeks relief is a nullity and void and 'no consequential relief need be asked for, 'for the simple reason that there is no need of setting aside that which has no existence in the eyes of the law', is governed by Article 17 (iii). 'If, however, the transaction 'is not a complete nullity in that sense' and 'is valid and operative until avoided* then consequential relief is 'involved' because the prayer then is for the removal of burden legally created.' (Underlined (herein ' ') by me).

17. Some of the other decisions cited by the Division Bench are these. In *Baldeoprasad v. Ghasiram*. 16 Nag LR 84: (AIR 1920 Nag 843-) M was held that a prayer to set aside a decree is not of a declaratory nature and the suit is one for both a declaration and consequential relief and ad valorem court-fee was payable under section 7(iv)(c) of the Act. In .ILR (1939) Nag 373 at p, 375: (AIR 1938 Nag 1'83 at p. 184), it was observed:

'It does not matter how you frame your prayer What matters is what must be done in order, if that prayer be granted, to make the granting of it effective.'

The claim was for a declaration that the land purchased by the plaintiff was not liable to the maintenance charge of defendant No. 1. It was held that this necessarily involved the granting of the consequential relief, such as the cancellation of a document or the avoidance of a decree and the suit fell under Section 7(iv)(c) of the Court-fees Act.

In ILR (1943) Nag 440: (AIR 1943 Nag 70), it was held that a suit by a Hindu son for a declaration that the decree obtained against his father was not binding on him involved a consequential relief and ad valorem Court-fee was payable. The principle underlying the decision was that a decree obtained against the father is deemed to have been obtained against him in his representative capacity and in execution of that decree the son's interest was liable to be sold unless and until the decree is modified or set aside as against him. This declaration necessarily involved a consequential relief. The answer to the reference was that ad valorem court-fee was payable.

18. If I may say so with great respect, the rule to be followed in such cases is succinctly stated by Rose, J., in (1036-43) 1936-43 Taxing Decision of Nag. H. C. P. 36:

'A declaration is enough and no consequential relief need be asked for if the transaction in dispute is a complete nullity and void from the beginning as there is no need to set aside that which has no existence in the eyes of the law. But where the transaction is valid and operative until avoided, consequential relief is involved and has to be sought because of the prayer for the removal of a burden legally created.'

19. A Full Bench of the Patna High Court (Fazl Ali; C. J.. Chatterji and Sinha J.J) laid down the following rules in AIR 1944 Pat 17 (FB).

'(1) No doubt in considering what court-fee payable on a plaint, caution must be observed so as not to import into the plaint anything which it does not really contain, either actually or by necessary implication. In construing the plaint the Court must take it as it is. not as it may think it ought to have been. A relief not asked for cannot be imported so as to charge court-fee thereon. Where a plaintiff

who is entitled to consequential relief frames his suits as one for a declaration only the Court is not entitled to insist upon his praying for a consequential relief and paying the court-fee proper for such a suit.

(2) But the dexterity of the person drawing up the pleadings avoiding the use of certain words in the plaint, which would make the relief a consequential one, should not determine the amount of court-fee payable on the plaint. The Court-fee is dependent not on the form of the pleadings, but on the real substance of the relief claimed.

(3) A suit though cast in the form of a declaratory relief only, but in substance aiming at setting aside a deed formally executed and registered in accordance with law is governed by Section 7(iv)(c) and not by Schedule 2 Article 17 (iii).' In that case, it was held: -- 'As the sale deeds on their very face had been duly executed and properly registered, carrying with them the necessary legal consequence that title passed from the transferor to the transferee, the sale deeds would necessarily require to be cancelled in order to get rid of the legal consequences attaching to them. That being the very object of the suit though the plaintiff did not in terms ask for the cancellation of the deeds in question, that relief was implicit in the relief sought for the suit therefore being one for declaration and consequential relief was governed by Section 7(iv)(c) and not Schedule 2, Article 17 (iii).'

20. In my opinion, the dicta in the two last-mentioned cases and also the observations in Dullaji Parashuram's case. ILR (1939) Nag 373: (AIR 1938 Nag 183) (supra), all of which have been cited with approval in Ratansingh's case, ILR (1945) Nag 975: (AIR 1946 Nag 30) (supra), apply to the appellant's suit here. Recalling the observations in Ratansingh's case, ILR (1945) Nag 975: (AIR 1946 Nag 30), that it is not the language or the form but the substance and the nature of the claim which is the crux, it must be said that although the relief cause is worded as mere declaratory, essentially and substantially this is a suit for setting aside the sale. The sale deed, being a registered document, is valid and operative until avoided. As the plaintiff seeks the relief for declaration that the sale deed is void not only against his rights and interest but also that it is void in toto, that is, against

those also who expected it the prayer for its setting aside and cancellation is necessarily involved,

21. In Comolata Dutta's case, 1964 MPLJ 553: (AIR 1966 Madh Pra. 169) (supra), it was observed by the Division Bench:

'A party to the decree must sue to set aside the decree, and if instead he merely seeks a declaration that the decree is not binding on him, it is in substance one to set aside the decree. . . For the plaintiff, though not a party to the previous decree, yet bound by it as being passed against his predecessor-in-title a prayer for setting aside the decree is a proper relief. It is only when the plaintiff was neither a party to the previous decree nor was bound by it that he is not required to set aside the decree and a declaration that the decree is not binding on him or that it does not affect his interest would be sufficient.'

Applying that case, the position would have been different if the plaintiff restricted the suit to a declaration that the sale was not effective as against himself, for, then, it could not be said that the relief of setting aside the sale was involved. It is obvious enough that the plaintiff, a minor, is not merely seeking vindication of his own rights but is also fighting the battle for the executants of the sale deed.

22. In *Gyanchand v. Smt. Halkibai*, Civil Revn. No. 433 of 1962. D/- 17 12 1962 (MP), where the suit was for setting aside a trust deed, it was held that ad valorem court-fee was payable. That principle will equally apply where the relief of setting aside a deed is involved, though not prayed for in so many words. A suit for setting aside a decree or deed comes within Section 7(iv)(c) of the Court-fees Act.

23. Therefore, in my opinion, the plaintiff must pay court-fee on the plaint and on this appeal under Section 7(iv)(c) of the Court-fees Act. I would allow six weeks time to the plaintiff to make good the deficit.

ORDER

Naik and Shiv Dayal, JJ.

24. As we differ in our opinion on the question, whether, on appeal, as filed. viz., seeking the relief of declaration simpliciter. the court-fees paid were proper or not. we hereby refer the following question of law for its determination under Rule 11 of Chapter I of the High Court Rules read with Section 98 and Rule 34 of Order XLI of the Code of Civil Procedure by one or more Judges as the Hon'ble the Chief Justice may direct:

'Whether, in spite of the consequential relief of setting aside the sale deed being involved in the relief clause, if the plaintiff elects to claim a relief of declaration simpliciter (taking the risk of his suit, as it stands, being dismissed in the event of its being held that the suit was not maintainable under Section 42 of the old Specific Relief Act). Court fee is payable under Art 17(iii) of Schedule II. instead of Section 7(iv)(c) of the Court-fees Act?'

The proceedings shall now be laid before Hon'ble the Chief Justice for the purpose of nominating one or more of the other Judges of this Court to deal with the matter.
OPINION

Newaskar, J.

25. In this appeal, arising out of a suit purporting to be one for declarations sought for. difference of opinion having arisen between the Judges constituting the Division Bench on the question as regards payment of court-fee, having regard to the form of the suit, the matter in difference has been referred to me as a third Judge.

26. Material facts having a bearing on the question referred are as follows:--

27. The plaintiff appellant. Baldeosingh, who is a minor, filed the present suit through his next-friend. Durga Vinod Singh. for a declaration that the sale deed, dated 28-8-1959, executed by his eldest brother. Gopalsingh, who was joined as defendant No. 1 in the suit, in his capacity as a Karta of the joint Hindu family consisting of himself, his another brother. Raj Bahadursingh, who is joined as defendant No. 2, and the minor plaintiff, Baldeosingh. was void, as it was not executed for legal necessity or benefit of the estate. It was also averred in the

plaint that the suit property in respect of which the declaration was sought was actually in the possession of the tenants who had not attorned to the vendee nor had the defendant-vendee been able to secure possession of the property from those tenants otherwise. It was also pleaded in the alternative that as the plaintiff was minor it was not competent for Gopalsingh to self away the interests of the minor plaintiff, in view of the provisions contained in the Hindu Minority and Guardianship Act, 1956, such sale being void to an extent of the share of the plaintiff. The plaintiff therefore claimed the following declarations namely:--

(a) that the sale of the property in suit was wholly ineffective in law and void.

(b) in case the Court for any reason was unable to grant the relief stated in Clause (a) then it might be declared that the sale is ineffective and void as against the plaintiff's share in the suit property

28. The suit was contested both on the ground that the plaint was insufficiently stamped and could not proceed without payment of ad valorem Court-fee having regard to the consideration of the sale-deed as well as on merits

29. The trial Court, by its order, dated 28-3-1960, held that the Court-fee was payable under Article 17(iii). Schedule II of the Court Fees Act. and not under Section 7(iv)(c) since, according to its view, the plaintiff sought declaration simpliciter without asking for any consequential relief. It relied upon the observations in the case reported in ILR (1945) Nag 975: (AIR 1946 Nag 30). The trial Court thereafter proceeded to hear the case on merits and after recording the evidence found that the sale-deed effected by Gopalsingh, purporting to act in his capacity as a Karta of the family, was neither for legal necessity nor for any benefit of the estate. He however held that the plaintiff was not in possession and that he was bound to claim a decree for possession as a consequential relief and in its absence the suit for a bare declaration was not competent. On these findings the suit was held to be incompetent under Section 42 of the Specific Relief Act and was dismissed.

30. The plaintiff preferred appeal against that decision. When the appeal came on for hearing, a preliminary objection was raised on behalf of the respondent-vendee

that the Court fee paid on the memorandum of appeal as well as on the plaint was inadequate and that on the plaint, as it stood, ad valorem Court-fee was payable having regard to the amount of consideration mentioned in the deed of sale. The two learned Judges, who heard the preliminary Objection, differed in their view. Naik J., was of the view that inasmuch as the plaintiff has chosen to ask for bare declarations, apart from the question of tenability of such a suit in view of the provision contained in Section 42 of the Specific Relief Act, the plaintiff cannot be required to pay Court-fee ad valorem on the amount of consideration for the sale-deed which was impugned. Under the circumstances of the case Article 17(iii), Schedule 11 and not Section 7(iv)(c) of the Court-Fees Act would be applicable.

Reliance was placed by the learned Judge upon several decisions both of this Court as also of the other High Courts to some of which reference will be made hereafter. Shiv Dayal, J., on the other hand, held that although actual reliefs are cast in the form of declarations they are a mere camouflage and that it was competent for the Court to look into the substance and not the form in which the relief is claimed which in the present case is one for cancellation of the sale-deed and the appropriate provision applicable would be under Section 7(iv)(c) of the Court-Fees Act.

31. Question which is material for consideration is whether having regard to the nature of the plaint and particularly the nature of the relief which the plaintiff has asked for Article 17(iii), Schedule II or Section 7(iv)(c) of the Court-Fees Act is applicable for determining the amount of the Court-fee payable.

32. Before proceeding to consider the question on the basis of authorities both of this Court and of other High Courts it will be useful to state clearly the nature of the plaintiff's case and the declaration he seeks.

33. The plaintiff is a minor member of the coparcenary consisting of himself and his two brothers, the eldest of whom had effected a sale in favour of a third party. The plaintiff admittedly has the right to the suit property. By reason of the alienation made by another member, who is the Karta of the family, the alienee is interested in denying the plaintiff's right to the property. The right of the Karta of the family to make alienation is not absolute and unqualified right as held in

Hoonoomanpershad Pande's case. (1854-57) 6 Moo Ind App 393 (PC). It is a limited and qualified right and can be exercised only in the cases of family necessity or benefit of the estate. The burden in such a case is on the alienee to allege and if traversed to prove that either actual family need existed for the alienation or it was prompted by bona fide considerations of family benefit which was really conferred upon the family or lastly that he as a prudent man, had made bona fide enquiry and had satisfied himself as well as he can that such need existed. Thus the minor coparcener can seek declaration as to his right to the property on the ground that his right in spite of the alienation was unaffected as against the alienee who is interested in alleging and proving the above facts or either of them.

34. On the principles of Section 42 of the Specific Relief Act such a suit is a perfectly competent suit. It is not correct to say that in such a case he ought to seek cancellation of the deed of sale. Because the law gave him a right to ignore the alienation making it incumbent upon the alienee to come and seek to support the same on the grounds aforesaid. It is a different matter if the property has actually passed out of the family and the minor coparcener cannot say that he is in possession of the property. In that case further part of Section 42 comes into play, viz., the plaintiff being able to seek further and consequential relief besides declaration fails to do so. There the Court is precluded from granting a bare Declaration. In a particular case the plaintiff may come forward with an assertion which he may not be able to make out at the trial that he is in possession of the property or that the property still continues with the family. In that case, not praying for a consequential relief of possession takes the risk of his case being dismissed in case the Court at the late stage is not prepared to allow him to amend.

35. But the question of Court-fee will have to be considered on the basis of the actual form of the action and not on the correctness or falsity of the averments or the possibility or otherwise of his success in the case. The Court-Fees Act is a fiscal statute and it has to be strictly construed. It is of course open for the Court to determine the real form of relief which is attempted to be shrouded by dexterous use of expressions of declaratory sort when in reality what is sought is a consequential relief. This situation generally arises in the case of deeds and

decrees to which the plaintiff is a party co-nominee. In such cases when he seeks declarations as to absence of their binding character what he really does is to seek cancellation of the same. For, as will be seen by reference to Section 39 of the Specific Relief Act when one seeks cancellation of an instrument and induces the Court to award that relief what the Court does is to grant a declaration that the same is invalid. The further action as to it being delivered up and cancelled has in law to be taken by the Court suo motu whether that is asked for or not.

36. With the above statement as to the form of the present action and the legal position on the basis of Sections 42 and 39 of the Specific Relief Act we shall proceed to consider the authorities.

37. The case which is generally referred to in this connection is the decision of Sir Lawrence H. Jenkins in *Deokali Koer v. Kedar Nath*. (1912) ILR 39 Cal 704. In that case the plaintiff sought a declaration that a mortgage decree which was pending execution when the suit was filed had been collusively and fraudulently obtained and it was ineffectual, inoperative and invalid and that for the satisfaction of the said decree the mortgaged property, which was the subject-matter of the earlier decree and the later action in question, could not be sold. She also sought interim injunction. It is in that context of the plaintiff's averments in that case that Sir Lawrence Jenkins made the observations which are as follows:--

'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'.

It was further observed after referring to Section 42 of the Specific Relief Act:--

'It is in this Section (apart from particular legislative sanction) that the law as to merely declaratory decrees applicable in the circumstances of this case, is now to be found'.

And further:

'The Section does not sanction every form of declaration, but only a declaration that the plaintiff is 'entitled to any legal character or to any right as to any property:

it is the disregard of this that accounts for the multiform and, at times, eccentric declarations which find a place in Indian plaints.

If the Courts were astute -as I think they should be--to see that the plaints presented conformed to the terms of Section 42, the difficulties that are to be found in this class of cases, would no longer arise. Nor would plaintiffs be unduly hampered if the provisions of Section 42 were enforced, for it would be easy to frame a declaration in such terms as would comply with the provisions of the section where the claim was one within its policy.'

38. These observations cannot be construed to justify the stand taken on behalf of the respondents that in all cases of alienations by a managing member of a family when a minor member seeks a declaration as to his right to the alienated property alleging possession he seeks in fact cancellation of the deed of alienation. He is not bound to do so. But if he does he ought to pay for the relief which he claims.

39. The next case to be considered is the Full Bench decision of the Oudh Chief Court reported in AIR 1938 Oudh 1 (FB). It was a case where a person who was a party to a suit and a decree for partition sought a declaration about the decree being illegal and void. In such a case grant of a declaration of that sort would have necessarily the effect of setting aside the decree and relieving the plaintiff of the obligations under it. Their Lordships in that connection observed:--

'It has been said that the Court-Fees Act being a fiscal enactment, its provisions should be strictly construed, but, as observed by Jenkins C. J. (1912) ILR 39 Cal 704, they should not be so construed as to furnish a chance of escape and a means of evasion. Language is meant to be used as a vehicle for expression of one's thoughts: where, however, it is abused for the purpose of concealing the real thoughts, it seems to me to be clearly the duty of a Court of Justice to look to the substance of the plaint and not to allow itself to be deceived by the language used for evading the payment of proper 'duty by concealing the real purpose of the suit.'

It was further observed at page 7 column 1:--'In my opinion, even though a consequential relief may not be expressly prayed for, yet if such a relief is implicit in the declaration and is a necessary consequence of it, it must be deemed to be

included within the declaration prayed for in the suit. When a person who is a party to a decree asks for a declaration about the decree being illegal and void, the grant of such a declaration in his favour necessarily has the effect of setting aside the decree and relieving him of the obligation under it. I am therefore of opinion that the declaration claimed by the plaintiffs in the present suit carries with it the consequential relief of the setting aside of the decree.' This case is perfectly in the line with the decision in (1912) ILR 39 Ca1 704. and actually followed it.

40. Other cases involving similar principle are those reported in AIR 1941 Lah 97 (FB) and AIR 1944 Pat 17 (FB). In the former of these two cases alienations were by the sons of the person creating what is known as WAKF-AL-AULAD. Persons interested in the administration of the trust namely some of the descendents and relations of the WAKF sued for declaration that the alienations made by the sons of WAKF were null and void and ineffectual against the WAKF property. It was held on the basis of these facts that the plaintiff was really seeking consequential relief with reference to the deed of alienation though he had couched the prayer clauses in the form of declarations. In that case it was observed by Bliide J.. who delivered the judgment:--

'It seems to me that neither the answer to toe question whether the plaintiff is or is not a party to the decree or the deed sought to be declared as null and void, nor to the question whether the declaration sought does or does not fall within the purview of Section 42, Specific Relief Act, furnishes a satisfactory or conclusive test for determining the eourt-fee payable in a suit of this description. When the plaintiff is a party to the decree or deed, the declaratory relief, if granted, necessarily relieves the plaintiff of his obligations under the decree or the deed and, hence it seems to have been held in such cases, that the declaration involves a consequential relief. In cases, where the plaintiff is not a party to the decree or the deed, the declaratory relief does not ordinarily include any such consequential relief.'

It thus seems from these observations-and particularly the last portion of it that the present ease would not be taken to be one in which consequential relief is asked for in the . garb of a declaratory relief. But the learned Judge proceeded to

illustrate what he meant and in so doing took up for consideration the case of alienation by a Hindu Manager and seemed to hold that in such a case where a coparcener seeks a declaration he should be taken to have asked for a consequential relief, These observations were quite unnecessary.

Whether an alienation made by a manager binds other members or not depends upon considerations laid down in *Hoonoomanpershad Pande's case*. (1854-57) 6 Moo Tnd App 393 (PC) and it is competent for a member in possession of the family property to seek declaration as to his right to the property ignoring the alienations which according to him do not bind him. It is then for the alienee to allege and establish grounds for the binding character of the deed. If it were necessary for a member to set aside an alienation made by the manager then even if he be in possession he cannot defend his possession ignoring the alienation and must seek to set aside the alienation This cannot be the true position having regard to the principle enunciated in the decision in *Hoonoomanpershad Pande's case*. (1854-57) 6 Moo Ind App 393 (PCI. referred to above.

41. The Patna decision in AIR 1944 Pat 17 is in line with the decision in (1912) 1LR 39 Cal 704. which it actually follows. In that case the plaintiff, who was a widow, brought the suit for a declaration that the deed which she had been led to execute was fraudulently done without letting her know the contents and without consideration and the defendants had acquired no title under it With the position of the plaintiff as the executant the decision is 'perfectly understandable as involving a consequential relief.

42. In *Ramaswami v. Rangachiar*. AIR 1940 Mad 113 at p. 118 (FB), it is held that if a person not having an authority to execute deed or having authority under circumstances which did not exist, executes a deed, it is not necessary for persons not bound by it, to sue to set it aside, for it cannot be used against them. They may treat it as non-existent and sue for their right as if it did not exist The later Full Bench decision in *Sankaranarayana v. Kandasamia*. AIR 1956 Mad 670 (FB). affirmed this view and dealing with the case of an alienation made by a mother as guardian of her son distinguished that case from that of a manager of a joint Hindu

family. It held that the deed or alienation has to be set aside. The, aforesaid two Full Bench decisions indicate that where the alienation is by the manager of a joint Hindu family and the minor sons seek a declaration with regard to the same being not binding upon them on the ground of absence of legal necessity or benefit to the estate then it is not necessary for them to ask for the relief of setting aside the document incorporating the alienation. It is open for them to treat it as non-existent and sue for the declaration of their right.

43. In AIR 1932 All 485 (FB), it is held that where a substantive relief is claimed though in the garb of a declaratory decree of 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. With reference to this decision it was observed in the later Full Bench decision of the Allahabad High Court in Sri Krishna Chandra v. Maliabir Prasad, AIR 1933 All 488, (FB), that: the said decision 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 fee on the consequential relief which he should have claimed although he had omitted to do so.

The later decision of the Full Bench of the same High Court reported in Bishan Sarup v. Musa Mal, AIR 1935 All 817 (FB), considered the question with reference to Sections 39 and 12 of the Specific Relief Act and held that it is not open to the Court to treat the suit as one falling within the purview of Section 39 of the Specific Relief Act if the plaintiff desired it to be construed as one under Section 12 of the Specific Relief Act. The plaintiff is at liberty to construe the suit as one under Section 12 of the Specific Relief Act and that if on perusal of the plaint the Court considers that the case is one in which further relief should have been asked for, then it is open for it to refuse to grant a declaration. It is further held that where the plaintiff deliberately seeks the relief of declaration and deliberately avoids claiming consequential relief such as the cancellation of an instrument the court fee on the plaint and the memorandum of appeal should be fixed court-fee under Article 17(iii) Schedule II of the Court-Fees Act.

44. Coming to the decisions of this Court it would be pertinent in the first place to refer to the decision reported in *Kashinath v. Bapu-rao*. AIR 1910 Nag 305 (FB). The Full Bench recognised the clear distinction between cases of alienation made by a Manager of a joint Hindu family governed by Mitakshara as obtaining in Benaras School of Hindu Law and that in Bombay and Madras. In the case of the former it was held that the alienation not for legal necessity or benefit to the estate is absolutely void whereas in the latter case it is valid but capable of being avoided. We have for the purpose of this reference to assume in the present case that the parties are governed by the Benaras School of Hindu law. That is the case with which the plaintiff came to the Court

45. Coming to the specific question of Court-fee the first decision to be noted is one reported in *Baburao v. Balajirao*. AIR 1929 Nag 71 (Maenair A. J. C.) where the Court had to deal with a suit for declaration that a registered deed in that case did not affect plaintiff's title. The plaintiff was a party to the deed. The learned A. J. C. held that the suit is clearly one under the provisions of Section 39 of the Specific Relief Act and such a suit is for a declaratory decree with consequential relief and the court-fee must be paid under Section 7(iv)(c) of the Court-Fees Act. According to the Additional Judicial Commissioner the relief claimed is really the same where the plaintiff purports to ask that the document should be adjudged voidable or declared not to affect the plaintiff's title or be set aside or cancelled. It has to be noted that although in that case a declaration simpliciter was asked for it was asked for by a person who was a party to the deed and in the declaration which he sought it was implicit that the deed which ordinarily bound him was to be held to be not binding. This is exactly the kind of declaration which is contemplated under Section 39 of the Specific Relief Act with reference to deeds.

46. Next case to be considered is the one reported in AIR 1943 Nag 70. It was held in that case by Vivian Bose J., that a decree ordinarily binds parties and privies and a person not a party to the decree need not set it aside but it was observed that if for one reason or another he is bound then in the relief of declaration simpliciter there is implicit a prayer that the decree be modified so as to exonerate his interest. If a litigant says that he wants a declaration only the taxing authorities can only say that the court-fee payable on the relief of declaration

simpliciter is a certain figure and they must leave the wider question of consequential relief to the Judge deciding the case in appeal where the question arises at the stage of the appeal It was also held: --

'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 have 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.'

47. It does not appear that the Full Bench decision in AIR 1940 Nag 305 (FB), to which the learned Judge was a party, was taken into account in taking the view that the sons though not parties to the decree ought to seek to set it aside and when they claim mere a declaration such relief of setting aside is implicit in it. It also does not appear that any question of alienation was involved in that case.

48. In AIR 1946 Nag 30. it was held by Niyogi and Sen JJ., that a suit brought by the legal representatives of a deceased daughter who was a party to the registered agreement under the Debt Conciliation Act having the force of a decree to have the decree set aside must pay ad valorem court-fee. It was held that the Court-Fees Act is a fiscal statute and ought to be construed strictly and in the case of any ambiguity or doubt the same should be resolved in favour of the subject. It was further held that the question of court-fee has to be decided on the claim as it is framed and not as it ought to have been framed.

49. In *Kishanlal v. Narayandas*, ILR 1946 Nag 578: (AIR 1946 Nag 251). it was held that a suit in which the plaintiff claims a declaration that a decree is null and void on the ground that it was an outcome of a fraud practised on the Court is governed by Section 7(iv)(c) of the Court-Fees Act the reason given being that the decree is valid until it is set aside.

50. In *Panduran Mangal v. Bhojalu Usanna*, AIR 1949 Nag 37, Sen J., held that, in a suit by the sons of a manager who were neither parties to the mortgage nor to the mortgage-decree, for a declaration that the auction sale held in execution of

the mortgage-decree was inoperative as the mortgage was without consideration and not for legal necessity or benefit to the estate of the minor sons without seeking to set aside that decree, the court-fee payable is under Article 17(iii), Schedule II of the Court-Fees Act and not under Section 7(iv)(c). The reason given being that in such a suit it is not necessary for the plaintiff to sue to set aside the decree. In a later case in the same year it was held by Sarwate J., in the case reported in AIR 1949 Nag 211, that where the plaintiff was not in possession of his deceased father's self-acquired property and sued for a declaration that he has a share in and is entitled to be the manager of such property a consequential relief was implicit in the prayer made by him for a declaration of the sort claimed and Section 7(iv)(c) was applicable and not Article 17(iii). Schedule II of the Court Fees Act.

51. In *Laxminarayan v. Ram Sarup*. AIR 1957 Madh Pra 173. it was held by me that where the son brought a suit contending in effect and in substance that the alienation made by the father was not binding on him and that therefore a declaration as to his title and his possession of the property in his own right might be granted as also as to the non-executability of the decree passed in the suit against the father alone on the basis of the mortgage, the suit was for a bare declaration in which consequential relief was not involved court-fee payable was therefore under Article 17(iii). Schedule II and not under Section 7(iv)(c) of the Court Fees Act. Some of the Nagpur decisions referred to above including the last mentioned decision of Sen J., in AIR 1949 Nag 37, were relied upon.

52. It thus seems from the review of these authorities that where the plaintiff sues for a declaration simpliciter without further seeking any consequential or substantial relief, the fact that his claim would be incompetent, because of his failure to seek further and consequential relief which he was able to claim does not affect the question of court-fee and he will be liable to pay court-fee under Article 17(iii) of Schedule II of the Court-Fees Act and not under Section 7(iv)(c). But the declaration asked for by the plaintiff in such a case must not be a mere garb for the real, substantial or consequential relief intended to be claimed. If it be so it is competent for the Court to look to the substance of the relief claimed apart from the form and require him to pay the court-fee which he would be bound to pay in

case he had not resorted to a device in concealing the relief he really wanted

53. Further where the plaintiff is not bound either by a deed or a decree to which he co-nominee not a party or privy because of its being void on the allegations made by him, when his claim for declaration with reference to his title to the property, alleged to be in his possession. will not be taken to involve a claim for a consequential relief.

54. I would particularly rely upon the observations in the Full Bench decision of this Court in AIR 1940 Nag 305 (FB) and the Full Bench decision in AIR 1940 Mad 113 (FB) and AIR 1966 Mad 670, as also upon the decision in AIR 1949 Nafi 37, and AIR 1957 Madh Pra 173, with which I respectfully agree and. which, in my opinion, do not. run counter to any Division Bench decision placed before me having a direct bearing.

56. I would, therefore, agree with the conclusions reached by Naik J., and hold that court-fee payable in this case would be under Article 17(iii) of the Second Schedule of the Court-Fees Act and not under Section 7(iv)(c). I would answer the question referred accordingly.