REVISIONAL CIVIL

Before Inder Dev Dua and Daya Krishan Mahajan, JJ.

SHEEL KUMAR,—*Petitioner.*

versus

ADITYA NARAIN AND ANOTHER,—*Respondents.*

Civil Revision No. 444-D of 1962.

1964

April, 22nd.

Code of Civil Procedure (Act V of 1908)—S. 115—Revision against the order holding plaint not poperly stamped—Whether competent—Specific Relief Act (I of 1877)—S. 42—Suit for a declaration that partition deed is a sham transaction without asking for its cancellation—Whether maintainable—Court-fees Act (VII of 1870)—S. 7 (iv) (c) and Schedule II-Art. 17—Court-fee payable—Whether ad valorem under S. (iv) (c) or fixed under Art. 17.

Held, that an order accepting the objection as to court-fee and valuation raised by the defendant, if erroneous, can be corrected in revision. It cannot be denied that by wrongly deciding the question of court-fee, the Court may, in certain circumstances, refuse to exercise jurisdiction in a matter in which it has undoubted jurisdiction or in other cases it may act illegally or with material irregularity in the exercise of its jurisdiction.

Held, that a suit for mere declaration that the partition deed between the son, the father and the step-mother was a sham transaction entered into for ulterior purposes and, therefore, there was in fact no partition which affected the plaintiff's status as a member of the Joint Hindu family, without asking for its cancellation is competent under section 42 of the Specific Relief Act, 1877. A prayer for the cancellation of the document will be a surplusage which can be ignored for purposes of court-fee and Suits Valuation Act. If it is found as a fact that there is no partition, nothing remains to be cancelled. The prayer as to the cancellation of the document is neither here nor there. What has actually not happened needs no

displacement as it does not exist. Such a suit requires to be stamped with the fixed court-fee under Article 17 of Schedule II and not with *ad valorem* court-fee under section 7 (iv) (c) of the Court-fees Act, 1870.

Petition under section 115 of Act V of 1908 for revision of the order of Shri M. L. Jain, Sub-Judge, 1st Class, Delhi, dated 24th August, 1962, ordering the plaintiff to make up deficiency in the court-fee.

S. N. Chopra and R. M. Gupta, Advocates, for the Petitioner,
R. M. Lall and Gauri Dayal, Advocates, for Respondent.

JUDGMENT

Mahajan, J.

Mahajan, J.—The entire case has been placed before us for disposal in view of the order of P. C. Pandit, J., dated the 12th November, 1963. The learned Judge felt some difficulty in deciding the preliminary objection in view of the conflict of decisions in this Court. The preliminary objection is that no revision is competent against the order of the trial Court holding that the plaint was not properly stamped. It has been settled by the Supreme Court in *Sri Rathnavarmaraja* v. *Smt. Vimla* (1) that if the objection as to court-fee is raised by the defendant and is decided against him, he cannot challenge that order in revision. Whether this rule also applies to the case, where the objection as to court-fee has been sustained now falls for determination. Falshaw, J. (as he then was) in *Dr. Harbans Lal Khosla* v. *Shri Mohan Lal Sanon* (2) and in *Manohar Lal* v. *Gulab Chand* (Civil Revision No. 382-D of 1963) took the view that no revision is competent even in the case where the objection as to court-fee has been sustained. Harnam Singh J. in *Smt. Anguri Devi* v. *Gurnam Singh* (3) had taken a contrary view. Harnam Singh J.'s view finds support from the various decisions of the Patna, Bombay, Nagpur, Madhya Pradesh and Calcutta High Courts. These decisions are *Ramkhelawan Sabu* Vs. *Bir Surendra Sahi and others* (4), *Mahadeo Gopal Pendse* Vs. *Hari Waman, Bhate* (5), *Pandurang*

(1) A.I.R. 1961 S. C. 1299.
(2) 1954 P.L.R. 198.
(3) I.L.R. 1951 Punjab 155=1950 P.L.R. 336.
(4) A.I.R. 1938 Patna 22.
(5) A.I.R. 1945 Bomb 336.

Mangal and others Vs. *Bhojalu Usanna and others* (6), *Laxmi Narayan Vs. Ram Sarup* (7) *and Sailendra Nath Kundu* v. *Surendra Nath Sarkar* (8). We are clearly of view that the decisions of Falshaw, C. J. cannot be sustained either on principle or on authority. The decision in *Dr. Harbans Lal Khosla's case* proceeded on the basis of the decision of the Supreme Court in *Keshawdeo Champria* v. *Radha Kishan Chamaria* (9), wherein the limits of the High Court's power under section 115 of the Code of Civil Procedure have been elaborately stated. The other ground taken was that "the High Courts should be particularly reluctant to interfere, since if only one further step is taken and, the plaintiff having failed to value his suit properly and pay the necessary court-fee, the plaint is rejected, that order is appealable and there does not appear to me to be any reason at all why a plaintiff should be allowed to challenge the preliminary order in revision". So far as the second reason is concerned it is now no longer sound in view of the decision of the Supreme Court in *Maj. S. S. Khanna* v. *Brig. F. J. Dillon* (10). It was observed by their Lordships of the Supreme Court that the revisional jurisdiction of the High Court may be exercised irrespective of the question whether an appeal lies from the ultimate decree or order passed in the suit. Otherwise according to their Lordships "it would restrict the exercise of this salutary jurisdiction to those comparatively unimportant suits and proceedings in which the appellate jurisdiction of the High Court is excluded for reasons of public policy".

Moreover, it cannot be denied that by wrongly deciding the question of Court-fee, the Court may in certain circumstances refuse to exercise jurisdiction in a matter in which it has undoubted jurisdiction or in other cases it may act illegally or with material irregularity in the exercise of its jurisdiction. To us it appears that the better view of the matter is as has been taken by the

(6) A.I.R. 1949 Nagpur 37.
(7) A.I.R. 1957 M.P. 173.
(8) A.I.R. 1935 Cal. 279.
(9) A.I.R. 1953 S.C. 23.
(10) A.I.R. 1964 S.C. 497.

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various other High Courts in India, namely, that an order accepting the objection as to court-fee and valuation raised by the defendant, if erroneous can be corrected in revision. This disposes of the first ground on the basis of which Falshaw, J. took the contrary view.

On the merits, the matter does not admit of much doubt. The plain reading of the plaint discloses that the plaintiff's case is that the partition deed between the son, the father and the step-mother dated the 12th July, 1958, was merely a sham transaction and was entered into for ulterior purposes and, therefore, in fact there was no partition which affected the plaintiff's status as a member of the joint Hindu family. The defendants took up the objection that the suit was barred by section 42 of the Specific Relief Act as a suit for mere declaration was not competent and the plaintiff must sue for the cancellation of the document. It was also pleaded that if a further relief is to be necessarily sought, no fixed court-fee is payable, but court-fee has to be paid under section 7(iv)(c) of the Court Fees Act. It is common ground that according to the proviso to section7(iv)(c) *ad valorem* court-fee on the value of the property involved has to be paid and it is not open to the plaintiff to fix any valuation he likes. The short question, therefore, that falls for determination, is, whether fixed court-fee or *ad valorem* court-fee is leviable.

It appears to us that on the allegations in the plaint, a suit for mere declaration is competent. A prayer, for the cancellation of the document is purely a surplusage and can be ignored for purposes of Court-fee and Suits Valuation Act. If it is found as a fact that there is no partition, nothing remains to be cancelled. The prayer as to the cancellation of the document is neither here nor there. What has actually not happened needs no displacement as it does not exist. This matter is not bare of authority. The proper course, therefore, is to refer to the decided cases which have a direct bearing on the matter.

It was held in *Umarannessa Bibi* v. *Jamirannessa Bibi* (11) that, "where a person is induced to execute, the

(11) A.I.R. 1923 Cal. 362.

document other than that he had undertaken to execute, the document is void and need not be cancelled. Whether it is incumbent upon the plaintiff to ask for consequential relief must depend upon the circcumstances of each case. It is plain that there may be cases in which a declaration may be sufficient for his protection. In such an event the plaintiff cannot be compelled to seek a consequential relief." This authority is by one of the greatest Judges of this country, Sir Asutosh Mookerjee, and is entitled to great respect, and in our view lays down the correct rule. Stone C.J. in *Onkarsing Singdaring* v. *Firm Shrikishan-Radhakishan* (12), took a similar view. In this case, a person in order to defraud his creditors had transferred his property to B. He then sued for a mere declaration that the property belonged to him without claiming the relief that the sale-deed be declared nominal and ineffective. It was held in this case that only a fixed court fee was payable. To the same effect is another decision of the Patna High Court in *Bulakram* v. *Ganga Bishun Chaudhri* (13). Harries, C. J. delivered the leading judgment with which Fazl Ali, J. concurred. It was held in this case that—

> "there was in substance a prayer that the document be declared void. The consequential relief asked for, namely, an injunction was not a very appropriate and satisfactory relief, and it was unnecessary to grant the plaintiff an injunction. The suit could be treated as suit for a declaration simpliciter under section 39 and the Court could in its discretion order the document to be delivered up and cancelled."

It was held in *Kattiya Pillai* v. *Rameshwamia Pillai* (14) that in deciding what the proper court-fee payable is, the Court must have regard to the substance of the thing and not to the mere form in which the relief has been prayed for. In that case, a suit was brought for cancellation of a will,

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(12) A.I.R. 1941 Nag. 174.

(13) A.I.R. 1940 Pat. 133.

(14) A.I.R.1929 Cal. 396.

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which had been registered, on the ground that the will was a forgery. It was laid down that a suit for declaration pure and simple was competent and it was not necessary to seek the consequential relief regarding the cancellation of the document.

The cases that have been cited by the respondents are cases where consequential relief either by way of possession or otherwise was necessary. It is not necessary to mention all of them, excepting the case of *Vishwa Nath* v. *Sita Bai and others* (15). In this case the suit was for setting aside a decree in execution of which property had been sold and possession delivered to the auction-purchaser and recovery of possession was prayed for. In this situation it was held by the Full Bench that such a suit for purposes of court-fee had to be valued under section 7(iv)(c). No fault can be found with this decision, and it does not in any manner support the respondents' contention.

After giving the matter our careful consideration, we are of the view that the Court below was in error in holding that the suit for pure and simple declaration is not competent and that it was necessary for the plaintiff to amend the plaint which had consequently been amended by the plaintiff, in view of the Court's order. This amendment was uncalled for and in our view, it makes no difference.

The learned counsel for the respondents then raised the contention that only the final order holding that *ad valorem* court-fee is payable was before us and that the earlier two orders, namely, (i) the order holding that the suit was not competent under section 42 of the Specific Relief Act, as a consequential relief had necessarily to be asked for; and (ii) the order allowing the amendment of the plaint by inclusion of the prayer for a consequential relief, have not been attacked. As the entire matter has come before us in revision, we can *suo motu* vacate these orders if we come to the conclusion that they are erroneous, and otherwise call for interference strictly in accordance with the provisions of section 115 of the Code of Civil Procedure.

(15) I.L.R. 1952 Punj. 373 (F.B.)=1952 P.L.R. 331 (F.B.).

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We are clearly of the view that the court below has acted illegally and with material irregularity in exercise of its jurisdiction in coming to the conclusion that the suit was not competent under section 42 of the Specific Relief Act and that it had to be valued for purposes of court-fee under section 7(iv) (c).

For the reasons given above, this petition is allowed and it is held that the plaint had been properly stamped and the suit for mere declaration is competent. The case will now go back to the trial Court for determination on the merits.

The parties are directed to appear in the trial Court on the 11th May, 1964. There will be no order as to costs.

INDER DEV DUA, J.—I agree.

Dua, J.

R.S.

FULL BENCH