Supreme Court of India
Shamsher Singh vs Rajinder Prashad & Ors on 3 August, 1973
Equivalent citations: 1973 AIR 2384, 1974 SCR (1) 322
Author: A Alagiriswami
Bench: Alagiriswami, A.

PETITIONER:
SHAMSHER SINGH

Vs.

RESPONDENT:
RAJINDER PRASHAD & ORS.

DATE OF JUDGMENT03/08/1973

BENCH:
ALAGIRISWAMI, A.
BENCH:
ALAGIRISWAMI, A.
PALEKAR, D.G.

CITATION:
1973 AIR 2384 1974 SCR (1) 322
1973 SCC (2) 524

ACT:
Hindu Law-Joint Hindu family-Whether sons are liable for the debts of the father incurred without consideration and family necessity-Court Fees Act S. 7(iv)(7)-Its scope.

HEADNOTE:
There was a mortgage of a property in favour of the appellant for a sum of Rs. 15,000/-. The mortgagee filed a suit and obtained a decree. When he tried to take out execution proceedings for the sale of the mortgaged property, respondents 1 and 2 filed a suit for a declaration that the mortgage executed by their father was null and void as against them. as the property was a joint Hindu family property and the mortgage had been effected without consideration and family necessity. The plaintiffs (Respondent 1 and 2) paid a Court Fee of Rs. 19.50 and the value of the suit for purposes of jurisdiction was given as Rs. 16,000/-.
A preliminary objection was raised by the Appellant that the suit was not properly valued for purposes of Court Fee and jurisdiction. The Subordinate Judge held that although the case is 'covered by S.7(iv)(c) of the Court Fee Act, the proviso to that Section applied and directed the plaintiffs to pay Court.Fee on the value of Rs. 16,000/-. Thereafter,

the Court Fee not having been paid, the plaint was rejected. The plaintiff appealed before the High Court against that decision. The High Court held against the defendants taking the view that the plaintiffs were not at all bound by the mortgage in dispute since it was a joint family property. The first defendant appealed before this Court.

In this Court, preliminary objection were raised that the present appeal is not competent and secondly, the plaintiffs were not bound by the mortgage ,of the joint Hindu family property where there was no legal necessity to execute the mortgage. Allowing the appeal,

HELD (i) in the present case, the plaint was rejected under Order 7, Rule 11 of the C.P.C. Such an order amounts to a decree under S.2(ii) and there is a right to appeal open to the plaintiff. Furthermore, in a case in which. this Court has granted special leave, the question whether an appeal lies or not, does not arise. Even otherwise, a second appeal would lie under S.100 of the C.P.C. on the ground that the decision of the 1st appellate Court on the interpretation of S.7(iv)(c) is a question of law. There is thus no merit in the preliminary objection. [324E-G]

Vasu v. Chakki Mani (A.I.R. 1962 Kerala 84 referred to). Rathnavarmaraja v. Smt. Vimla, A.I.R. 1961 S.C. 1299 referred to and distinguished.

(ii) While the Court Fee payable on a plaint is certainly to be decided on the basis of the allegations and the prayer in the plaint and the question whether the plaintiff's. suit will have to fail for failure to ask for consequential relief is of no concern to the Court question of Court Fee, should look into at that stage, the Court in deciding the allegations in the plaint to see what the substantive relief that is asked for Mere cleverness in drafting the plaint will not be allowed to stand in the way of the Court looking at the substance of the relief asked for. In the present case, the relief asked for is on the basis that the property in dispute is a joint Hindu family property and there was no legal necessity to execute the mortgage. It is now well settled that under Hindu Law, if the manager of a joint family is the father and the ,other members are sons, the father may, incur a debt, so long as it is not for immoral purposes and the joint family estate is open to be taken in execution ,of proceedings upon a decree for the payment of the debt. [324G-3250]

Fakir Chand v. Harnam Kaur 1967 1 S.C.R. 68, referred to.

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(iii) In the present case, when the plaintiffs sued for a declaration that the decree obtained by the appellant against their father was not binding on them, they were really asking for setting aside the decree or for the consequential relief of injunction restraining the decree holder from executing the decree against the mortgaged property. [325B-C]

In deciding whether a suit is purely declaratory, the

substance and not merely the language or the form or relief claimed should be considered. [325G]

Zeb-ul-Nisa v. Din Mohammad, A.I.R. 1941 Lahore 97 referred to.

(iv) In a suit by the son for a declaration that the mortgage decree obtained against his father is not binding upon him. it is essential for the son to ask for setting aside the decree as a consequence of the declaration claimed and to pay ad velorem Court fee under s. 7(iv)(c). A decree against the father is a good decree against the son and unless the decree is set aside, it will remain executable against the son and it is essential for the son to ask to set aside the decree.

Further, in a suit by the son for a declaration that a decree against the father, does not affect his interest in the family property, consequential relief is involved and ad velorem Court fee is necessary. [326F-G]

Prithvi Rai v. D. C. Ralli, A.I.R. 1945 Lahore 13, and Vinayakrao v. Mankunwar Bai, A.I.R. 1943 Nagpur 70, referred to

The Judgment of the Court was delivered by

ALAGIRISWAMI, J.-This appeal raises the, question of the court fee payable in the suit filed by the 1st respondent and his minor brother the 2nd respondent against their father the 3rd respondent and the alienee from him the appellant.

On 13-7-1962 the father executed a mortgage deed in favour of the appellant of a property of which he claimed to be the sole owner for a sum of Rs. 15,000/-. The mortgagee, the appellant filed a suit on the foot of this mortgage and obtained a decree. When he tried to take out execution proceedings for the sale of the mortgaged property, respondents 1 and 2 filed a suit for a declaration that the mortgage executed by their father in favour of the appellant is nun and void and ineffectual as against them as the property was a joint Hindu family property, and the mortgage had been effected without consideration and family necessity. On this plaint the plaintiffs _paid a fixed court fee of Rs. 19.50 and the value of the suit for purposes of jurisdiction was given as Rs. 16,000. A preliminary objection having been raised by the appellant that the suit was not properly valued for purposes of court fees and jurisdiction, the Subordinate Judge tried it as a preliminary issue. He held that although the case is covered by section 7(iv) (c) of the Court Fees Act, the proviso to that section applied and directed the plaintiffs to pay court fee on the value of Rs. 16,000 which was the amount at which the plaintiff-, valued the suit for the purposes of jurisdiction. The court fee not having been paid the plaint was rejected. The plaintiffs thereupon carried the matter up on appeal before the High Court of Punjab & Haryana. Before that Court the plaintiffs did not seriously contest the position that the consequential relief

of setting aside the decree within the meaning of Section 7 (iv) (c) of the Court Fees Act was inherent in the declaration which was claimed with regard to the decree. But taking the view that the plaintiffs were not at all bound by the mortgage in dispute or the decree, the High
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JUDGMENT:

CRIMINAL APPELLATE JURISDICTION:

Court held that there was no consequential relief involved since neither the decree nor the alienation binds the plaintiffs in any manner. The 1st defendant in the suit has, therefore, filed this appeal.

Before us a preliminary objection was raised based on the observations of this Court in Raihnavaramaraja v. Smi. Vimla (1) that the present appeal is not competent. In that case this Court observed that whether proper court-fee is paid on a plaint is primarily a question between the plaintiff and the State and that the defendants who may believe and even honestly that proper court-fee has not been paid by the plaintiff has still no right to move the superior courts by appeal or in revision against the order adjudging payment of court-fee payable on the plaint. But the observations must be understood in the background of the facts of that case. This Court was there dealing with an application for revision filed before the High Court under s. 115 of the Code of Civil Procedure and pointed out that the jurisdiction in revision exercised by the High Court is strictly conditioned by clauses (a) to (c) thereof and may be invoked on the ground of refusal to exercise jurisdiction vested in the Subordinate Court or assumption of jurisdiction which the court does not possess or on the ground that the Court has acted illegally or with material irregularity in the exercise of its jurisdiction, and the provisions of ss. 12 and 19 of the Madras Court Fees Act do not arm the defendant with a weapon of technicality to obstruct the progress of. the suit by approaching the High Court in revision against an order determining the court fee payable. The ratio of that decision was that no revision on a question of court fee lay where no question of jurisdiction was involved. This decision was correctly interpreted by the Kerala High Court in Vasu v. Chakki Mani(2)where it was pointed out that no revision will lie against the decision on the question of adequacy of court- fee at the instance of the defendant..... unless the question of court fee, involves also the question of jurisdiction of the court. In the present case the plaint was rejected under Order 7, Rule 1 1 of the C.P.C. Such an order amounts to a decree under section 2(2) and there is a right of appeal open to the plaintiff. Furthermore, in a case in which this Court has granted special leave the question whether an appeal lies or not does not arise. Even otherwise a second appeal would lie under section 100 of the C.P.C. on the ground that the decision of the 1st Appellate Court on the interpretation of s. 7(iv) (c) is a question of law. There is thus no merit in the preliminary objection. As regards the main question that arises for decision it appears to us that while the court-fee payable on a plaint is certainly to be decided on the basis of the allegations and the prayer in the plaint and the question whether the plaintiff's suit will have to fail for failure to ask for consequential relief is of no concern to the court at that stage the court in deciding the question of court-fee should look into the allegations in the plaint to see what is the substantive relief that is asked for Mere astuteness in

drafting the plaint will not be allowed to stand in the way of the court looking at the substance of the relief asked for. In this case the relief asked for is on the basis that the property in dispute is a joint Hindu family property and there was no legal necessity (1) A. I. R. 1961 S. C. 1299.

(2) A. I. R. 1962 Kerala 84.

to execute the mortgage. It is now well settled that under Hindu Law if the manager of a joint family is the father and the other members are the sons the father may by incurring a debt so long as it is not for an immoral purpose, lay the joint family estate open to be taken in execution proceedings upon a decree for the payment of the debt not only where it is an unsecured debt and a simple money decree for the debt but also to a mortgage debt which the father is personally liable to pay and to a decree for the recovery of the mortgage debt by the sale of the property even where the mortgage is not for legal necessity or for payment of antecedent debt (Faqir Chand v. Harnam Kaur(1). Consequently when the plaintiffs sued for a declaration that the decree obtained by the appellant against their father was not binding on them they were really asking either for setting aside the decree or for the consequential relief of injunction restraining the decree holder from executing the decree against the mortgaged property as he was entitled to do. This aspect is brought out in a decision of the Full Bench of the Lahore High Court in Zeb-ul-Nisa v. Din Mohammad(2)where it was held that :

> "The mere fact that the relief as stated in the prayer clause is expressed in a declaratory form does not necessarily show that the suit is for a mere declaration and no more. If the relief so disclosed is a declaration pure and simple and involves no other relief, the suit would fall under Art. 17(iii)."

In that case the plaintiff had sued for a twofold declaration : (i) that the property described in the plaint was a waqf, and (ii) that certain alienations thereof by the mutwalli and his brother were null and void and were ineffectual against the waqf property. It was held that the second part of the declaration was tantamount to the setting aside or cancellation of the alienations and therefore the relief claimed could not be treated as a purely declaratory one and inasmuch as it could not be said to follow directly from the declaration sought for in the first part of the relief, the relief claimed in the case could be treated as a declaration with a "consequential relief." It was substantive one in the shape of setting aside of alienations requiring ad valorem court-fee on the value of the subject matter of the sale, and even if the relief sought for fell within the purview of s. 7 (iv) (c) of the plaintiffs in view of ss. 8 and 9, Suits Valuation Act, having already fixed the value of the relief in the plaint for purposes of jurisdiction were bound to fix the same value for purposes of court-fee. It was also pointed out that in deciding whether a suit is a purely declaratory, the substance and not merely the language or the form of the relief claimed should be considered. The court also observed :

> "It seems to me that neither the answer to the 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 ques-

tion whether the declaration sought does or does not fall within the purview of s. 42, Specific Relief Act, furnishes a satisfactory or conclusive test for determining the court fee payable (1) [1967] (1) S.C.R. 68.

(2) A. I. R. [1941] Lahore 97.

in the suit of this description. When the plaintiff is a party to the decree or deed, the declaratory relief, if granted, neces- sarily 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. tile declaratory relief does not ordinarily include any such consequential relief. But there are exceptional cases in which the plaintiff though not a party to the deed or the decree is nevertheless bound thereby. For instance, when a sale or mortgage of joint family property is effected by a manager of a joint Hindu family, the alienation is binding on the other members of the family (even if they are not parties to it) until and unless it is set aside.

Similarly, a decree passed against the manager will be binding on the other members of the If therefore a copartner sues for a declaration that such an alienation or decree is null and void, the declaration must I think be held to include consequential relief in the same may as in those cases in which the plaintiff is himself a party to the alienator, or the decree, which is sought to be, declared null and void. The case dealt with in AIR 1936 Lah 166 seems to have been of this description. The case of an alienation by a mutwalli of waif property would also ap- pear to stand on a similar footing. In the case of waif property, it is only the trustee or the mutwalli who can alienate the property. If he makes an alienation it is binding on all concerned, until and unless it is set aside. If therefore a person sues to get such an alienation declared null and void, lie can only do so by getting the deed invalidated. The relief claimed in such cases also may therefore be found to include a consequential relief." The decision of the Lahore High Court in Prithvi Raj v. D. C. Ralli (1) is exactly in point. It was held that in a suit by the son for a declaration that the mortgage decree obtained against his father was not binding upon him it is essential for the son to ask for setting aside of the decree as a consequence of the declaration claimed and to pay ad valorem court fee under s. 7(iv)(c). It was pointed out that a decree against the father is a good decree against the, son and unless the decree is set aside it would remain executable against the son, and it was essential for the, son to ask for setting aside the decree. In Finayakrao v. Mankunwarbai(2) it was held that in a suit by the son for a declaration that decree against the father does not affect his interests in the family property, consequential relief is involved and ad valorem court fee would be necessary. We should now refer to certain decisions relied upon by the respondents. We do not consider that the decision of the learned Single Judge of the Madras High Court in Venkata Ramani v. Mravanaswami(3) lays down the correct law. It proceeds on the basis that (1) A.I.R. 1945 Lahore 13.

(2) A.I.R. 1943 Nagpur 70.713.

(3) A.I.R. 1925 the plaintiffs not being parties to the document they were not bound to get rid of it by having it actually cancelled, but it ignores the effect of Hindu Law in respect of a mortgage decree obtained against the father. As pointed out by the Lahore High Court, in such cases in suing for

declaration that the decree is not binding on him the son is really asking for a cancellation of the decree. This aspect does not seem to have been taken into consideration by the learned Single Judge. The decision of a learned Single Judge of the Nagpur High Court in Pandurang Mangal v. Bhojalu Usanna(1) suffers from the same error. Though it refers to the decision of the Full Bench of the Lahore High Court as well as the same High, Court's decision in Prithvi Raj v. D. C. Ralli(2) it does not seek to distinguish them for holding otherwise. The learned-Judge gives no reason whether and if so why he dissents from the view taken in the latter case. This decision also suffers from the learned Judge's misapprehension that there is a difference between a simple money decree and a mortgage decree. obtained against a Hindu father when it is questioned by the son and its view that in execution of a simple money decree the entire joint family property, inclusive of the interest of the sons, is liable to be sold in execution of the decree, but that in the case of a mortgage decree it is not necessary for a son to allege or prove that the debt was incurred for an illegal or an immoral purpose and he can succeed if it is proved that the mortgage was not for legal necessity or for the payment of antecedent debt. We have already referred to the decision of the Court on this point. We must also hold in view of the reasons already set forth that the decision of the Allahabad High Court in Ishwar Dayal v. Amba Prasad (3) is not a good law. As regards the decision of the Full Bench of the Allahabad High Court in Bishan Sarup v. Musa Mal(4) there is nothing to show whether the alienation was made by the manager of a joint Hindu family and therefore the decision is not in point.

We, therefore, hold that the decision of the High Court was not correct and allow this appeal with costs. The plaintiffs would be given a month's time for paying the necessary court fee.

Appeal allowed.

(1) A.I.R. 1949 Nagpur 37.

(2) A.T.R. 1945 Lahore 13.

(3) A.T. R. 1935 Allahabad 667.

(4) A.I.R. 1935 Allahabad. 817.