1880
JUNE 23.
FULL BENCH.
4 B. 515 (F.B.).

The Chief Justice referred the question to Mr. Justice M. Melvill, who made the following order on the 17th November 1879 :—

M. MELVILL, J.—This Court has already held that a suit brought by a party who has failed in a miscellaneous proceeding under s. 246 of Act VIII of 1859, or the corresponding section of the new Code, is a suit to set aside a summary decision of a Civil Court. It is on this ground that we have held that, after or before the repeal of the last eleven words of s. 246 of Act VIII of 1859, such a suit must be brought within one year. The construction of the Court Fees Act upon this point must follow that which we have put on the recent Limitation Acts. The memorandum of an appeal must bear a stamp of Rs. 10 under art. 17, sch. II of the Court Fees Act. [This case is also referred to in 4 B. 515 (F.B.)].

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4 B. 529 (F.B.).

FULL BENCH—APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, Mr. Justice Melvill and Mr. Justice F. D. Melvill.

NARAYANRAV DAMODAR DABHOLKAR AND BROTHER (*Original Plaintiffs*), *Appellants v.* BALKRISHNA MAHADEV GADRE (*Original Defendant*), *Respondent.** [23rd June, 1880.]

Suit for a declaratory decree—Consequential relief—The Specific Relief Act (I of 1877), s. 42—Court Fees Act (VII of 1870). s. 7, cl. viii.

The defendant obtained a decree against D, father of the plaintiffs, for satisfaction of his debt by the sale of a moiety of a village mortgaged to him by D. In execution of it he attached the mortgaged property, the attachment being made under s. 274 of the Civil Procedure Code (Act X of 1877), by an order prohibiting D from transferring or charging the property in any way, and all persons from receiving it from him by [530] purchase, gift, or otherwise. The plaintiffs thereupon applied for the removal of the attachment but their application was rejected. They then sued for a declaration of their right to two-thirds of the property. The District Judge, who tried the suit rejected it on the ground that it was barred by s. 42 of the Specific Relief Act (I of 1877), because the plaintiffs might have sought further relief than a mere declaration of title and omitted to do so. He was of opinion that the attachment constituted a dispossession and that the plaintiffs might have asked to be replaced in possession or, at any rate, for the removal of the attachment.

Held by the High Court on appeal that the plaint was not open to objection on the ground that it only asked for a declaratory decree without any consequential relief.

Held that the prohibitory order to D. did not constitute a dispossession of D., and still less of the plaintiffs, and that they could not have properly asked for removal of the attachment by a cancellation of the prohibitory order to D., so long as they admitted that D. had an interest in the attached property.

Held, also, that the plaintiffs could not have properly asked for any consequential relief in their suit, but that when they instituted it, they were entitled and indeed bound to ask for a declaration of their right, if only to prevent a purchaser at the sale under the defendant's decree against D., from afterwards alleging that he had purchased without notice of the plaintiffs' claim.

[F., 4 M. 131; L.B.R. (1893—1900) 139; Appl., 7 Bom. L. R. 267 (272); R., 12 A. 129=1890 A.W.N. 39 (F.B.); 8 B. 481 (486); 16 B. 608 (616).]

THIS was an appeal from the decision of W. Wedderburn, Judge of the District Court of Ahmednagar, in original suit No. 1 of 1879.

Damodar, father of the plaintiffs Narayan and Gopal, and *jaghirdar* of the village of Akolner, mortgaged half of his *jahgir* village to the defendant Balkrishna. Balkrishna brought a suit upon this mortgage, and

* Appeal No. 30 of 1879.

1880
JUNE 23.
FULL BENCH.
4 B. 529 (F.B.).

obtained a decree by which it was ordered that the mortgage-debt should be satisfied by the sale of the mortgaged property. On the 26th November 1877, Balkrishna applied for the attachment and sale of a moiety of the village in execution of his decree, and the property was, accordingly, attached under the provisions of s. 274 of the Civil Procedure Code (Act X of 1877). The plaintiffs thereupon applied for the removal of the attachment, but their application was rejected. The plaintiffs then brought the present suit, praying for a declaration that they were entitled to the property in dispute, and that it was not liable to be attached and sold for the debts of their father Damodar. The plaint stated that two-thirds of the property belonged to the plaintiffs on account of their own shares, the remaining third share belonging to their father Damodar, who, however, was not [531] competent to dispose of it as he pleased, and that they were in possession of the property. The suit was filed on the 3rd March 1879, in the *jaghirdar's* Court at Akolner, and transferred to the District Court of Ahmednagar. The plaint bore a stamp of the value of Rs. 10. Plaintiff No. 2 was a minor, represented by plaintiff No. 1 as his guardian.

The defendant contended (*inter alia*) that the plaint was insufficiently stamped under the Court Fees Act (VII of 1870), s. 7, cl. 8, and that the plaintiffs could not obtain a decree, having regard to the provisions of s. 42 of the Specific Relief Act (I of 1877), and that they ought to have first sued for partition, as they were not divided from their father.

One of the issues raised by the District Judge was, whether the plaintiffs were precluded from bringing the present suit by the provisions of s. 42 of the Specific Relief Act (I of 1877). He found this issue in the affirmative, and rejected the plaintiff's claim on this preliminary point, without going into the merits. The following are his reasons:—

"And I proceed, first, to dispose of this preliminary contention, which forms the subject-matter of the second issue, on which argument has been heard. Section 42 of Act I of 1877 provides that, under certain circumstances, a person may institute a suit against any person denying his title to any property, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief. But the discretion of the Court is limited by the proviso, 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. In the present suit, plaintiffs ask for a declaratory decree, and omit to seek consequential relief. The issue, therefore, narrows itself to the question—When plaintiffs brought this suit, were they able to seek further relief? I think that a perusal of the plaint will show that this question must be answered in the affirmative. For defendant has attached the *jaghir* estate in question, and under this attachment the proceeds are paid into Court. Plaintiffs, who wish to disclaim the mortgage-debt of their father Damodar, applied to raise the attachment. And as this application was rejected, there seems no reason why they should not bring a suit, under s. 283 of the Civil Procedure Code (Act X of 1877) to establish their right to the two-thirds of the [532] estate to which they lay claim in para. 4 of the plaint. They object that they are already in possession of the estate, and therefore do not require to bring a suit for possession. I do not understand how they can be said to be in possession if the estate is under the attachment of this Court. But, supposing this to be the case, they might still seek further relief by suing to raise the attachment under which all the profits of the

1880
JUNE 23.
FULL BENCH.
4 B. 529. (F.B.).

estate are paid into Court for the benefit of the judgment-creditor. Looking also, at the case from another point of view it is to be noted that they have asked this Court to declare that the estate is not liable to be attached for Damodar's debts. In the same spirit they should have asked that the existing attachment should be raised. On the second issue I find that the suit is barred by s. 42 of the Specific Relief Act (I of 1877).".

The District Judge referred to the cases of *Ganpatgir* v. *Bholaghir* (1) and *Motichand Jaichand* v. *Dadabhai Pestonji* (2).

The plaintiffs appealed to the High Court.

Shamrav Vithal, for the appellants—The District Judge was wrong in holding the plaifitiff's suit barred by s. 42 of the Specific Relief Act, because they asked for no consequential relief. This is a suit, although the plaint does not expressly say so, under the provisions of s. 283 of the Civil Procedure Code (Act X of 1877), and not a suit under s. 42 of the Specific Relief Act (I of 1877). The plaintiffs' are already in possession, as stated in the plaint (see *Babaji Lakshman* v. *Vasudev Vinayak* (3)). Possession, therefore, is not the object of the suit. Section 283 of Act X of 1877 now stands for s. 246 of the old Code. A suit may be for the establishment of a right only, and not for possession : *Mathura Pandey* v. *Ram Racha Tewari* (4). An attachment does not amount either to dispossession or change of ownership. It was, therefore, unnecessary for the plaintiffs to sue either for possession or for removal of the attachment. All that they wanted was a declaration of their right and title in the property. The two cases relied upon by the District Judge in support of his decision, do not apply to the present case. In *Ganpatgir* v. *Ganpatgir* (1) the plaintiff was out of possession, unlike **[533]** the plaintiffs in the present case, and sued for a declaration of his right to property, admittedly in the adverse possession of the defendant. The Madras High Court has pointed out when and under what circumstances a suit for a mere declaration should be allowed: *Chokalingapeshana Naicker* v. *Achiyar* (5). In *Motichand Juichand* v. *Dadabhai Pestonji* (2) the High Court held the plaintiff's suit to be, in effect, a suit for the removal of the attachment, though, apparently, it sought a declaration.

The learned pleader also referred to *Jetti* v. *Sayad Husein* (6), *Venkapa* v. *Chenbasa*(7), *Rungo Vithal* v. *Rykhivadas Rayachand* (8), *Settiappan* v. *Sarat Singh*(9), *Amjad Alli* v. *Kunku Shaw*(10), *Koylash* v. *Preonath*(11), *Gulzari Mal* v. *Jadaun*(12), as showing the nature of the suits brought by unsuccessful claimants under s. 246 of Act VIII of 1859, which corresponds with s. 283 of the new Code (Act X of 1877).

M. C. Apte (with him *G. R. Kirloskar*), for the respondent.—Although the plaintiffs have, apparently, sued for a declaration of right, the real object of their suit is the removal of the attachment placed on the property by the defendant. Such a suit, therefore, is inadmissible on a stamp of Rs. 10, as held in *Ganpatgir* v. *Ganpatgir*(1), *Motichand Jaichand* v. *Dadabhai Pestonji* (2) and *Chokalingapeshana Naicker* v. *Achiyar* (5). The Madras case has been approved by this Court in *Ganpatram Babaji* v. *Bai Suraj* (Sp. Ap. No. 175 of 1877 (13)). Moreover, plaintiffs are not divided from their father. They ought, therefore, to sue for a partition

(1) 3 B. 230. (2) 11 B.H. C. R. 186. (3) 1 B. 95.
(4) 3 B L.R. 108-112. (5) 1 M. 40. (6) 4 B. 23 (note).
(7) *Idem.* 21. (8) 11 B.H.C.R. 174. (9) 3 M H. C. R. 220.
(10) 9 B.L.R. Appx. 28. (11) 4 C. 610. (12) 2 A. 63.
(13) Printed Judgments for 1877, p. 345.

1880
JUNE 23.
FULL BENCH.
4 B. 529 (F.B.).

between him and themselves. The defendant should not be harassed with such a partition suit, which he would be forced to bring after the sale of the attached property.

Shamrav Vithal in reply.—Suits of the nature of the present suit are allowed on a stamp of Rs. 10 : *Sadashiv Yeshvant* v. *Atmaram Sakharam* (Sp. Ap. No. 136 of 1876 (1)), *Chunia and* [534] *another* v. *Ramdial* (2); *Gulzarimul* v. *Jadaunrai* (3). No doubt these cases were under s. 246 of the old Civil Procedure Code (Act VII of 1859). But they are equally applicable under s. 283 of the new Code, which is substituted for it.

The following is the judgment of the Full Bench :—

JUDGMENT.

MELVILL, J.—In this case the defendant obtained a decree against Damodar, the father of the plaintiffs, for satisfaction of his debt by sale of a moiety of the village of Akolner, mortgaged to him by Damodar. In execution of that decree he proceeded, in accordance with the usual (but, as we think, unnecessary) practice in the mofussil, to attach the mortgaged property. The proceedings in execution are not before us ; but it may be presumed that the attachment was made in the manner prescribed by s. 274 of Act X of 1877, *viz.*, by an order prohibiting Damodar from transferring or charging the property in any way and all persons from receiving the same from him by purchase, gift, or otherwise.

The plaintiffs thereupon brought the present suit. The plaint is badly drawn, and prays that, besides a declaration of the plaintiffs' right to two-thirds of the property, it should be declared that Damodar's own one-third share was not liable for his debt. This last demand was, of course, altogether untenable, and it appears from the arguments of the plaintiffs' pleader, that it was not seriously pressed. The real demand of the plaintiffs may be taken to have been for a declaration of their right to two-thirds of the property, and nothing more.

The District Judge, without going into the merits of the case, rejected the claim, on the ground that the suit was barred by s. 42 of Act I of 1877, because the plaintiffs might have sought further relief than a mere declaration of title, and omitted to do so. In the District Judge's opinion, the attachment constituted a dispossession, and the plaintiffs might, therefore, have asked to be replaced in possession. At any rate, the plaintiffs might, in the District Judge's opinion, have asked that the attachment should be raised. We do not, however, think that the District Judge's judgment can be supported on either of these [535] two grounds. The prohibitory order to Damodar did not constitute a dispossession of Damodar, and still less of the plaintiffs. It simply prohibited alienation. Nor could the plaintiffs have asked that the attachment should be raised by the prohibitory order to Damodar being cancelled, so long as they admitted, as they do admit, that Damodar had an interest in the attached property.

Under the circumstances of this case we do not think that the plaint is open to objection on the ground that it asks only for a declaratory decree, and not for consequential relief. We do not see in what manner the plaintiffs could have asked for consequential relief; but we think that, when they instituted this action, they were entitled, and were indeed

(1) 4 B. 535, *infra*. (2) 1 A. 361. (3) 2 A. 63.

1880
JUNE. 23.

FULL BENCH.

4 B. 529 (F.B.).

bound, to ask for a declaration of their rights, if only to prevent a purchaser at the sale, made under the defendant's decree against Damodar, from afterwards alleging that he had bought without notice of the plaintiff's claim.

We would, therefore, reverse the District Judge's decree, and remand the case for a decision on the merits. Costs to follow final result.

Decree reversed.

NOTE—See *Kalova* v. *Palapa* (1 B. 248) and the cases cited in argument, as to declaratory suits, at p. 250.

4 B. 535 N.

SADASHIV YESHVANT v. ATMARAM SAKHARAM.

Court Fees Act (VII of 1870), sch. II, art. 17—Stamp—Valuation of suit—Summary decision.

The plaintiff had attached certain immoveable property in execution of a decree against a third party. The attachment was removed on application by the defendant, under s. 246 of Act VIII of 1859, whereupon the plaintiff sued for a declaration that the property in dispute belonged to his judgment-debtor, and was liable to be attached and sold under his decree. The plaint, which did not state any amount as the value of the claim, bore a Rs. 10 stamp. The suit was dismissed on the ground that the plaint ought to have been stamped according to the value of the plaintiff's claim.

Held by the High Court, on appeal that the plaint was properly stamped, under sch. II, art. 17, cl. I of Act VII of 1870, as the suit [536] was a suit to set aside a summary decision of a Civil Court not established by Letters Patent.

IN this case the plaintiff Sadashiv had attached certain immoveable property in execution of his decree against a third party. But the attachment was raised, on the application of the defendant Atmaram, under s. 246 of Act VIII of 1859. The plaintiff, therefore, sued for a declaration that the property in dispute belonged to his judgment-debtor, and that it was liable to be attached and sold in satisfaction of his decree. The plaint was drawn on a stamp of Rs. 10. The plaintiff, however, did not fix any amount in the plaint as the value of his claim. The Subordinate Judge of Rahimatpur, in whose Court the suit was filed, rejected it on the ground that the value of the plaintiff's claim was not set forth in the plaint. His decision was upheld, in appeal, by the District Judge of Satara, Mr. R. F. Mactier, who held that the plaint ought to have been stamped according to the value of the plaintiff's claim, and not with a stamp of Rs. 10. He, accordingly, dismissed the plaintiff's appeal. The plaintiff thereupon appealed to the High Court. It was contended for him in special appeal that a stamp of Rs. 10 was proper for the plaint under the provisions of the Court Fees Act, as the suit was one, under s. 246 of Act VIII of 1859, for a declaration that the property in dispute was liable for attachment and sale in satisfaction of the plaintiff's decree; that the District Judge misunderstood the nature of the suit, and erred in holding that the stamp should cover the value of the property in disoute. The appeal was heard by M. Melvill and Kemball, JJ., on the 1st August, 1876. The following is the Court's judgment (M. Melvill and Kemball, JJ.):—

JUDGMENT.

M. MELVILL, J.—We think that the plaint was sufficiently stamped with a stamp of 10 rupees, as the suit appears to be nothing more than a suit to set aside a summary decision of a Civil Court not established by Letters Patent (Court Fees Act, sch. II, art. 17, cl. (i). That the Legislature describes such a suit as a suit to set aside a decision, appears from Act IX of 1871, sch. II, art. 15, which substituted for the last twelve words of s. 246 of Act VIII of 1859; and that such decision is to be regarded as a "summary decision," appears from more than one judgment of the High Courts at Bombay and Calcutta (see 6 B. H. C. R. (A.C.J.) 39; 2 B.L.R. (A.C.J.) 236; 14 W.R. 95.)

The decrees of the Courts below, are, therefore, reversed, and the suit remanded for a decision on the merits. Costs to follow final result.

Decrees reversed.

[This case is also followed in 10 B. 610 (F.B.).]