

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Radnade.

1895.
August 12, 15.

SHRIMANT SAGA'JIRA'O KHANDERA'V NA'IK NIMBA'LKAR (ORIGINAL PLAINTIFF), APPELLANT, v. S. SMITH, VAKIL (ORIGINAL DEFENDENT), RESPONDENT.*

Civil Procedure Code (Act XIV of 1882), Secs. 102, 103, 157 and 158—Court Fees Act (VII of 1870), Sec. 7, Cl. 4 (c) (1), Sch. II, Art. 17, Cl. (iii) (2)—Civil Courts' Act Bom. (Act XIV of 1869), Sec. 26 (3)—Suits' Valuation Act (VII of 1887), Sec. 8 (4)—Limitation Act (XV of 1877), Secs. 5, 6A and 14—Suit for a declaration that a decree obtained by defendant against plaintiff was null and void—Valuation for the purposes of Court fees and jurisdiction—Decree for declaration without consequential relief—Adjourned hearing—Dismissal of suit for non-appearance of plaintiff or his pleader—Appeal—Jurisdiction—Delay in presenting appeal—Discretionary power of Court to excuse delay.

A suit in which the only prayer is to have a decree set aside as null and void is a suit for a declaratory decree without consequential relief; and article 17, clause 3, and not section 7, clause 4 of the Court Fees Act VII of 1870, is applicable to it.

*Appeal, No. 9 of 1895.

(1) Section 7, clause iv (c) of the Court Fees Act (VII of 1870):—

7. *Computation of fees payable in certain suits.*—The amount of fee payable under this Act in the suits next hereinafter mentioned shall be computed as follows:—

I.	*	*	*	*	*
II.	*	*	*	*	*
III.	*	*	*	*	*
IV. In suits		*	*	*	*
(a)	*	*	*	*	*
(b)	*	*	*	*	*

(c) *For a declaratory decree and consequential relief.*—To obtain a declaratory decree or order, where consequential relief is prayed.

According to the amount at which relief sought is valued in the plaint or memorandum of appeal.

(2) Article 17, clause (iii), Schedule II of the Court Fees Act (VII of 1870):—

17. *Plaint or memorandum of appeal in each of the following suits:—*

I.	*	*	*	*	*
II.	*	*	*	*	*

III. To obtain a declaratory decree where no consequential relief is prayed.....Ten rupees, (proper fee.)

(3) Section 26 of the Civil Courts' Act (Bom. Act XIV of 1869):—

26. In all suits decided by a Subordinate Judge of the First Class in the exercise of his ordinary and special original jurisdiction, of which the amount or value of the subject-matter exceeds 5,000 rupees, the appeal from his decision shall be direct to the High Court.

(4) Section 8 of the Suits' Valuation Act (VII of 1887):—

8. Where in suits other than those referred to in the Court Fees Act, 1870, section 7, paragraphs V, VI, IX, and paragraph X, clause (d), Court fees are payable *ad valorem* under the Court Fees Act, 1870, the value as determinable for the computation of Court fees and the value for the purposes of jurisdiction shall be the same.

Section 5A of the Limitation Act (XV of 1877) is, like section 14, a mandatory section, but does not exclude the discretionary power of the Court, under section 5, to excuse delay in presenting an appeal.

An order dismissing a suit at an adjourned hearing for non-appearance of the plaintiff and his pleader is an order under section 157 and its consequential section 102, and not under section 158, of the Civil Procedure Code (Act XIV of 1882), and is appealable.

APPEAL from the decision of Ráo Bahádur N. N. Nánávati, First Class Subordinate Judge of Poona.

The plaintiff sued for a declaration that a decree for Rs. 7,287-11-4 obtained against him by the defendant in a former suit in the Court of the First Class Subordinate Judge of Poona was null and void. For purposes of Court fees payable on a plaint for a declaratory decree under the Court Fees Act (VII of 1870), Schedule II, article 17, clause (iii), the plaintiff paid a Court-fee stamp of Rs. 10 on the plaint, which, if the *ad-valorem* scale of $7\frac{1}{2}$ per cent. be applied to it, would give Rs. 130 as the computed value of the claim.

On the application of the defendant during the pendency of the suit, the Court fixed the 23rd February, 1894, for the hearing and for the examination of the plaintiff and one of his witnesses in Court. On the day appointed, the plaintiff's pleader sent an intimation to the Court that he was unwell. The hearing was thereupon adjourned till the 27th February. On that day the case was postponed by consent of pleaders of both parties till the 7th March, on the understanding that the adjournment was to be final. On the 7th March the plaintiff's pleader sent a fresh note stating his inability to attend the Court on account of his illness, and the plaintiff also did not appear in Court, he too being then ill, as he subsequently informed the Court.

The Judge (Ráo Bahádur Chunilál) dismissed the suit for default of plaintiff's appearance. The order of dismissal was recorded in the following terms:—

"Neither the plaintiff nor his pleaders are present. The defendant and his pleaders are present. When the case was put before the Court on the 27th February, it was distinctly told to the plaintiff's pleader that no adjournment would be granted, and yet the pleaders and the plaintiff are absent. The plaintiff had himself to be present to-day to give evidence. The plaintiff had two pleaders. * * * intimates that he is ill. The other pleader is not present. Suit dismissed for non-appearance of the plaintiff or his pleader. Defendant's costs on plaintiff."

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On the 9th April, 1894, the plaintiff applied for the restoration of the suit to the file, but the then Judge on the 27th June, 1894, rejected the application. The following is an extract from his judgment:—

“Exhibit 15 is the copy of the order of dismissal passed. The order does not state under what section of the Civil Procedure Code it was passed. I must, therefore, apply the section which is applicable.

“This application purports to have been made under sections 157 and 103 of the Civil Procedure Code (Act XIV of 1882) and the applicant wants the suit to be restored to file. I think these sections are not applicable here. The section applicable is 158. * * * There can be no doubt that it (suit) was dismissed under section 158. When an order is passed under section 158, the matter cannot be revised by such an application as the present one * * *. I think that the order of dismissal passed on the 7th March, 1894, by Ráo Bahádur Chunilál must be held to be a decree (I. L. R., 16 Bom., 23).”

On 23rd August, 1894, the plaintiff applied to the High Court under its extraordinary jurisdiction, and obtained a *rule nisi* calling on the defendant to show cause why the order passed by the Judge should not be set aside and the suit restored to the file. The rule was argued before Sargent, C. J., and Fulton, J., who discharged it on the 15th January, 1895, holding that the Judge's order of dismissal was passed under section 103 and not under section 158, and was, therefore, under section 588 of the Civil Procedure Code (Act XIV of 1882), appealable.

The plaintiff then applied under section 5 of the Limitation Act (XV of 1877) for admission of the appeal notwithstanding the delay. The delay having been excused by Fulton, J., subject to any objection that might be taken by the defendant at the hearing, the appeal came up for admission before Parsons, J., who dismissed it on the ground that an appeal ought to have been preferred against the decree passed under section 158 of the Civil Procedure Code. The plaintiff presented an appeal from that order of dismissal under the Amended Letters Patent, 1865, (24 and 25 Vict., Chapter 104), and the Court (Sargent, C. J., and Bayley, J.) reversing the order passed by Parsons, J., admitted the appeal and directed notice thereof to be issued to the defendant.

At the hearing the respondent raised a preliminary objection that the High Court had no jurisdiction to entertain the appeal.

Mahádeo B. Chaubal, for the respondent (defendant):—The amount of the decree which we obtained against the plaintiff in the former suit was more than Rs. 5,000. Hence the claim was cognizable by the Court of the First Class Subordinate Judge at Poona and an appeal against his decree lay direct to the High Court. But in the present suit the plaintiff, though he seeks to have a declaration that the decree is null and void, has valued the relief which he claims at Rs. 130 only. When a claim is for an amount which is less than Rs. 5,000, an appeal does not lie direct to the High Court according to section 26 of the Civil Courts' Act (XIV of 1869). In such cases the appeal lies to the District Court—*Gulábsingji v. Lakshmansingji*⁽¹⁾; *Bái Varunda Lakshmi v. Bái Manegóvri*⁽²⁾; *Sangápa v. Shivbasáva*⁽³⁾; *Báji Balvant v. Raghunáth Vitthal*⁽⁴⁾. The High Court has, therefore, no jurisdiction to entertain the present appeal. See also section 8 of the Suits' Valuation Act (VII of 1887); section 39 of the Specific Relief Act (I of 1877). The plaintiff asks practically for cancellation of the decree, and the cancellation itself is consequential relief, which the plaintiff has in the present case valued at Rs. 130. It has been held that when a plaintiff asks for a declaration with respect to a document, the suit relates to a substantial relief—*Fúkeerchand v. Thakoor Singh*⁽⁵⁾; *Tácoordeen v. Nawáb Syed Ali Hosein Khán*⁽⁶⁾; and *Naráin Putter v. Aya Putter*⁽⁷⁾.

Vicáji (with *Gangáram B. Rele*) for the appellant (plaintiff):—Rs. 130 is distinctly stated in the plaint to be a mere computed value of the claim at $7\frac{1}{2}$ per cent. payable on the *ad-valorem* scale on plaints generally; but Rs. 7,005 is the amount which strictly determines in this case the pecuniary jurisdiction of the Court. All that we seek to obtain is a purely declaratory decree, or a decree without consequential relief of any kind, and hence we have paid a Court-fee stamp of Rs. 10 on the plaint. Article 17, clause iii, Schedule II, of the Court Fees Act has laid down that sum as a fixed Court fee for plaints or appeals in all such suits.

(1) I. L. R., 18 Bom., 100.

(4) P. J., 1876, p. 142.

(2) *Ibid.*, 207.

(5) 15 Cal. W. R., 421.

(3) P. J., 1889, p. 98.

(6) 21 Cal. W. R., 340.

(7) 7 Mad. H. C. Rep., 372.

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In reality, therefore, our claim is to have the decree declared void; and the amount of it being more than Rs. 5,000, the appeal lies direct to this Court.

[JARDINE, J., referred to section 8 of the Suits' Valuation Act.]

We submit that that section is not applicable to the present case, but to cases in which the appeal lies to the District Court. It relates to cases in which the Court fee is to be paid *ad valorem* according to the Court Fees Act, while for cases like the present the Court Fees Act has laid down the fixed fee of ten Rupees.

The cases cited for the respondent are not in point, as some of them are in respect of suits for accounts or other consequential relief. The other cases relate simply to the plaintiff's *status* by adoption, and are clearly distinguishable from the present case.

Section 39 of the Specific Relief Act applies to instruments other than decrees. Counsel also cited section 42 of the Specific Relief Act; Daniell's Chancery Practice, pages 817, 818; *Nilmong Mookhopadhyaya v. Aimmunissa Bibee*⁽¹⁾; *The Earl of Brandon v. Henry Becher*⁽²⁾; *Dhurowidhur Sen v. The Agra Bank*⁽³⁾; *Flower v. Lloyd*⁽⁴⁾.

[JARDINE, J., referred to *Patch v. Ward*⁽⁵⁾.]

Mahádeo B. Chaubal, in reply:—Even if the prayer be merely to avoid the decree, the Court will still have to take some sort of action in the matter, and any such act would itself be a consequential relief. A mere declaration would give no relief by itself. The Court would have to cancel the decree—Seton on Judgments, page 148. In the present case the property of the defendant was actually attached under the decree, and, therefore, a suit for a mere declaration without consequential relief cannot lie.

Cur. adv. vult.

1895, August 12. JARDINE, J.:—The plaintiff valued the relief he sought at Rs. 130. Under Act XIV of 1869, section 26, the present appeal would lie to the District Court, and not to the

(1) I. L. R., 12 Cal., 156.

(3) I. L. R., 5 Cal., 86.

(2) 3 Cl. & F., 479.

(4) 10 Ch. Div., 327, 328.

(5) L. R., 3 Ch., 203.

High Court, unless the value or amount of the subject-matter exceeds Rs. 5,000. The plaintiff has computed the Court fees on the amount of Rs. 130.

It is conceded that if section 8 of Act VII of 1887 applies, the appeal lies to the District Court. Section 8 applies to suits under section 7, clause 4 (c), of the Court Fees' Act, 1870, to obtain a declaratory decree or order where consequential relief is prayed. The contention of the appellant is that no consequential relief is prayed; and so the suit is one described in article 17, clause 3, of the Schedule II. To such a suit section 8 of Act VII of 1887 does not apply.

Although the plaint recites that the plaintiff has come to know of the existence of the decree in the course of proceedings against him in execution, the only prayer is that the decree may be declared null and void. The suit thus differs from the second suit supposed in *Manohar v. Bawa Ramcharandás* ⁽¹⁾ and from *Gulab-singji v. Lakshmansingji* ⁽²⁾ and *Rám Prasád v. Sukh Dái* ⁽³⁾, suits about accounts where consequential relief was claimed in the plaint.

It was mooted that in the present case the relief asked for was the cancelling of a fraudulent decree, and that this was consequential relief. But in *Karam Khán v. Daryai Singh* ⁽⁴⁾ a Full Bench held the contrary, even though cancelling of a deed was prayed for. *Sankara v. Vijaya* ⁽⁵⁾ is also based on the view that consequential relief is not prayed for in a suit like the present. The last case is opposed to *Naráin v. Aya* ⁽⁶⁾ which is in accordance with the interpretation of the Privy Council decision in *Tacoorden v. Nawáb Syed Ali Hosein Khán* ⁽⁷⁾ stated by Couch, C.J., in *Joy Náráin v. Grish Chunder* ⁽⁸⁾ that "where a plaintiff asks to have a deed or will set aside, there is a prayer for substantial relief." This view is stated as to the particular suit in *Ahmed v. Thomas* ⁽⁹⁾, where, however, there was a general prayer. The Allahabad Full Bench in *Karam Khán v. Daryai Singh* notice that the

(1) I. L. R., 2 Bom., 219.

(2) I. L. R., 18 Bom., 100.

(3) I. L. R., 2 All., 720.

(4) I. L. R., 5 All., 331.

(5) I. L. R., 7 Mad., 134.

(6) 7 Mad. H. C. Rep., 372.

(7) 21 W. R., 240.

(8) 22 W. R., 438.

(9) I. L. R., 13 Cal., 162.

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Privy Council judgment was passed before section 39 of the Specific Relief Act was passed. In *Ahmed v. Thomas* the question was not about any deed or decree, but the suit was to have it declared that the property attached by a creditor belonged not to the judgment-debtor, but to the plaintiff. The Judges there differ from *Dhondo v. Govind*⁽¹⁾, which follows *Parvati v. Kisan Singh*⁽²⁾, and not *Ganpatgir v. Ganpatgir*⁽³⁾. *Parvati v. Kisan Singh* is based on *Dayachand v. Hemchand*⁽⁴⁾, a Full Bench case. These cases, however, deal more with the effect of the proviso in section 42 of the Specific Relief Act, and with the mode of interpreting a fiscal enactment, than with the point before us.

Having reviewed the decisions we would observe that some of them are based upon ascertained facts, the learned Judges being in a position to say what the real claim was. In the present case the Court knows nothing except what the plaint says. The suit is analogous to one under section 39 of the Specific Relief Act (I of 1877) merely to have the decree adjudged void; leaving it to the Subordinate Judge to do what he likes with his decree if he so adjudges it void. The Court has not such knowledge of the facts as to enable it at this stage to say whether there is a case to which the proviso in section 42 of the Act applies or whether the case is like *Ganpatgir v. Ganpatgir* or the cases about rescission of deeds. There have been cases like *Patch v. Ward*⁽⁵⁾, where the bill was filed to set aside a deed of foreclosure and also to redeem the mortgage, or where other relief may have been prayed, for the relief may be very various. It may be that a mere declaration will effect all that the plaintiff wants; and that this will lead to the execution-proceedings against him being dropped. The Court cannot assume that he is out of possession.

We hold, therefore, that the case is not one coming within the words of section 7, clause 4(c).

The appeal then came on for further hearing.

Mahádeo B. Chaubal:—We contend that the appeal is time-barred. The application for the restoration of the suit to the file was rejected on the 27th June, 1894. The usual time to file an

(1) I. L. R., 9 Bom., 20.

(3) I. L. R., 3 Bom., 230.

(2) P. J., 1881, p. 121.

(4) I. L. R., 4 Bom., 515.

(5) L. R., 3 Ch. D., 203.

appeal under the High Court rules is ninety days. Therefore the time to file the appeal expired somewhere in September or October, 1894, after deducting the time spent in obtaining copies. But the appeal was presented on the 16th January, 1895. It is, therefore, time-barred. It may be contended that under the provisions of the Limitation Act the time spent in the matter of the application under the extraordinary jurisdiction should also be deducted in computing the period of limitation. But section 5 A of the Limitation Act extends the time only when the appellant or applicant is misled by any order or practice or judgment of the High Court of the presidency, province or district. In the present case the order which misled the plaintiff was the order of the First Class Subordinate Judge and not of the High Court. Therefore, under section 5 A the time cannot be extended. The section is mandatory.

*Vicáji (with Gangáram B. Rele) :—*If the interpretation sought to be put on section 5 A of the Limitation Act was correct, then it would become almost inoperative. That section must be read with section 5 in order to give effect to the intention which the Act contemplates—*Balwant v. Gumani*⁽¹⁾.

We submit that we have been prejudiced by the order of the Judge refusing to consider our application on the merits. If the application had been entertained, we would have shown sufficient grounds for the restoration of the suit to the file.

1895, August 15. JARDINE, J. :—Section 5 A is mandatory like section 14. But it does not exclude the discretionary power of the Court under section 5. We adopt the reasoning of the learned Judges in *Balwant v. Gumani*⁽¹⁾. The facts of the present are also on all fours with those in that case. We think the delay was rightly excused.

We are in accord with the Bench—Sargent, C.J., and Bayley, J.,—who decided the Appeal No. 12 of 1895, under the Letters Patent, that the order of the 7th March, 1894, which purports to dismiss the suit for non-appearance, was an order made under section 157. The case had been adjourned till the 7th March, 1894, at the motion of the plaintiff and with the consent of the defendant,

(1) I. L. R., 5-All., 591.

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in order that the plaintiff should tender some evidence. If he had put in any appearance in person or by pleader, his default in producing the evidence might have been a reason for a decision under section 158. But as he did not appear, we think the most appropriate section to which the order must be referred is section 157, and its consequential section 102. The Court below is, therefore, wrong in treating the order as made under section 158 and in refusing to consider on its merits the application made by the plaintiff under section 103.

We, therefore, set aside the order of the Subordinate Judge of the First Class, and direct him to hear the application. The respondent to pay the costs of this appeal.

Order set aside.

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Before the Honourable Chief Justice Farran and Mr. Justice Parsons.

CHATURBHAI KARSAN AND OTHERS, MANAGERS OF THE SHOP OF KARSAN NA'GJI (ORIGINAL PLAINTIFFS), APPELLANTS, v. HARBHA'MJI HARISANGJI (ORIGINAL DEFENDANT), RESPONDENT.*

Mortgage—Suit by mortgagee on mortgage—Interest allowed at mortgage rate up to decree—Transfer of Property Act (IV of 1882), Secs. 86 and 88.

In a suit by a mortgagee to recover the money due on his mortgage, the plaintiff is entitled to interest at the rate specified in the mortgage-deed up to date of decree, and a Civil Court has no discretion to refuse to award such interest.

APPEAL from the decision of Ráo Bahádur Lálshankar Umia-shankar, First Class Subordinate Judge of Ahmedabad.

The plaintiffs sued to recover the amount due on a mortgage executed by the defendant on the 23rd July, 1883.

The Subordinate Judge passed a decree for the plaintiff for Rs. 10,223, but allowed interest only up to the date of filing the suit.

The plaintiffs appealed.

Govardhanrám M. Tripathi, for the appellants (plaintiffs):—
We are entitled to interest at the mortgage rate up to the date

* Appeal No. 71 of 1894.