

---

**(2009) 05 AHC CK 0066**  
**In the Allahabad High Court**

Smt. Rajni Swami

APPELLANT

Vs

Smt. Shakuntala Sharma

RESPONDENT

---

**Date of Decision :** 28-05-2009

**Acts Referred:**

Specific Relief Act, 1963 — Section 39  
Succession Act, 1925 — Section 2

**Citation :** AIR 2009 All 152 : (2009) 3 AWC 2873 : (2011) 7 RCR(Civil) 654

**Hon'ble Judges :** D.K. Arora, J; Amitava Lala, J

**Bench :** Division Bench

**Final Decision :** Dismissed

---

## Judgement

Amitava Lala, J.—This appeal is arising out of order impugned passed by the Addl. Civil Judge (Senior Division), Court No. 2, Meerut dated 9th February, 2009 directing the plaintiff-appellant to deposit ad valorem court fee in proceeding with the suit.

2. Being aggrieved/dissatisfied with the order impugned, Mr. Mukhtar Alam, learned Counsel appearing for the appellant contended before this Court that the suit is in the nature of declaration simplicitor, therefore, fixed court fee, as prescribed under Article 17 (iii) of Schedule-II of the Court Fees Act, 1870 will be applicable in this case. But the court below, under the order impugned, wrongly and erroneously held that the plaintiff-appellant is required to be paid ad valorem fees.

3. On one hand the nature of relief, as appears from the plaint, is that a Will executed by the testator in favour of the defendant-respondent is declared to be null and void on the other hand Sri Rahul Mishra, learned Counsel appearing for the defendant-respondents contended before this Court that the plaintiff-appellant is required an order which in effect wanted to get right over the property inherited by him on the basis of the Will and as such, the suit is not made for declaration simplicitor but coupled with the right, title or interest over and above such property, therefore, the court fees u/s 7(iv-A) is required to be

paid to obtain said order.

4. In considering the cause, there are various judgments. Let us consider the ratio of the judgments to synchronize the event. A Full Bench of Allahabad High Court in a Judgment in Smt. Bishun Shri v. Smt. Suraj Mukhi and Ors. AIR 1966 All 563, has already held per majority that the word "instrument" in Section 7(iv-A) of the Court-Fees Act, 1870 as in U.P. includes formal or legal documents in writing. It is sufficiently broad to include Wills also. The word "securing" is the present participle from verb "to secure." It has got various meanings (Words and Phrases (Permanent Edition). Vol. 38 p. 458) "Secures" as used in a contract whereby a vendor agrees to execute a conveyance thereof as soon as the vendee secures the payment of purchase money, means not a payment in money, but the giving by the vendee of something by means whereof payment at some future time can be procured or compelled, (ibid). Webster defines "secures" to mean "to make certain", "to put beyond hazard", "To secure" is to make safe, to put beyond hazard of losing or of not receiving, as to secure a debt by a mortgage ; it also means to get safely in possession, to obtain to acquire certainly, as to secure as inheritance or a price (ibid 459).

5. The question is whether a Will can be regarded as a legal document which makes any property secure or safe. Section 2(h) of the Indian Succession Act, defines a Will as a "legal declaration of the intention of the testator with respect to his property which he desires to be carried into effect after his death. "It is well known that during the life-time of the executant, the Will is ambulatory. It could be revoked by him at his will. Accordingly, a Will does not secure any property during the lifetime of the executant. Section 7(iv-A) does not require that an instrument should secure money or property having money value from the moment of its birth. It seems to us that whether an instrument secures money or property having money value within the meaning of Section 7(iv-A) is to be decided with reference to the date of the institution of the suit. It is to be seen whether a particular instrument secures on the date of the institution of the suit money or property having money value. This reference necessarily follows from a collocational reading of this Section with Section 39 of the Specific Relief Act. If this is so, as we think, then there is little doubt that on the date of the institution of the suit in this case the Will did secure property. Ganga Prasad the testator had died, and after his death the Will became irrevocable. Upon his death his estate would be disposed of in accordance with his directions in the Will. Accordingly it can be said that on the death of the testator the Will secures money or property having money value. We, therefore, hold that the court-fee paid on the plaint and the memorandum of appeal is insufficient. The amount of deficiency mentioned in the office report should now be paid by the plaintiff within three months.

6. In Kailash Chand Vs. Vth A.C.J., Meerut and others, a Division Bench of this Court also held that a suit involving cancellation or adjudication as void or voidable of such a document it certainly covered by Section 7(iv-A) (U.P.

Amendment) of the Court Fees Act. It is also held therein that it is inconsistent with the decision taken by the Full Bench as referred above. It has further been held that so long as the Will has not become operative on account of death of the testator, the Will is not a document or an instrument securing property having money value but once the testator died and a suit is filed after the death of the testator that Will become an instrument securing the property having money value. As in the instant case, admittedly the suit has been filed long after the death of the testator the Will has become operative and therefore, the Will is an instrument or document securing property having money value. Since Section 7(iv-A) (U. P. Amendment) specifically provides for payment of court fee in case where the suit is for or involving cancellation or adjudging void or voidable an instrument securing property having money value, Article 17(iii) of Schedule II of the Court Fees Act shall not be applicable.

7. In *Ajay Tiwari Vs. Hriday Ram Tiwari and Others*, a Division Bench of our High Court in connection of sale deed held that it being a documents securing other property within the meaning of Section 7(iv-A) of the Act, a suit for declaration of the sale-deed as null and void squarely falls within the four corners of Section 7(iv-A) and Article 17 (iii) of Schedule-II which applies to suits not otherwise provided for in the Act does not come into play.

8. In *Her Highness Maharani Riwa Smt. Parveen Kumari v. Sangam Upnivesh Awas and Nirman Sahakari Samiti Ltd. and Ors.* 2008 (3) ALJ 375, a Division Bench of our High Court presided over by one of us (Amitava Lala, J.), it has been held that when declaratory relief coupled with injunction, cannot be a declaratory relief simplicitor so that it can be attracted by Article 17 (iii) of the Act and fixed court-fees have to be directed to be paid. Such Article is made for the fixed court-fees, but as soon as it merges with other reliefs, the scope of fixed court-fees evaporates and premise stands occupied by ad valorem court-fees. Such ad valorem court-fees is based on certain facts and figures.

9. A three Judges Bench of Supreme Court in *State of Uttar Pradesh Vs. Ramkrishan Burman (Dead) by L. Rs. and Others*, it has been held that a decree for declaration of title to money or other property is not "a decree for money or other property." The expression in Section 7(iv-A) (U.P.) means only a decree for recovery of money or other property. It does not include a decree concerning title to money. A suit for mere declaration that the plaintiff is a owner of certain properties does not fall u/s 77(iv-A) of the Act.

10. In *Arun Kumar Tiwari Vs. Smt. Deepa Sharma and Others*, has held that where the relief of injunction is consequential to the relief of declaration, the case is covered by Section 7(iv-A) of the Court Fees Act and ad valorem court-fees is to be paid on the entire valuation of the suit and Article 17 of the Schedule II of the Court Fees Act would not be applicable.

11. In *Smt. Bibbi and Another Vs. Shugan Chand and Others*, a Full Bench of our High Court has held that in a suit for declaration that the sale deed is

unauthorised, void, illegal and ineffective as against plaintiff is for adjudging the sale deed void or voidable and hence falls squarely within the four corners of Section 7(iv-A) and Article 17(iii) of Schedule-II which applies only to suits not otherwise provided.

12. In Chief Inspector of Stamps, U.P., Allahabad Vs. Mahanth Laxmi Narain and Others, it has been held that for the purpose of court-fee, the Court must look at the relief as prayed for in the plaint. In order to ascertain the real nature of the reliefs claim, the substance of the plaint has to be considered. If a declaratory relief alone has been prayed for the Court cannot superadd consequential relief which it thinks the plaintiff ought to have prayed for and treat it as a consequential relief. Likewise, if only a substantive relief is prayed for, it is not open to a Court to add or read a declaratory relief also into it and treat it as a declaratory relief with a consequential relief.

13. In Smt. Shefali Roy Vs. Hero Jaswant Dass and others, it has been held that word "securing" occurring in the words "other document securing money or other property having such value" used in clause (iv-A) is not only related to the money part of the decree but other property as well and therefore, word "securing" relates to recovery or possession of the other property, otherwise putting this word "securing" in this provision becomes meaningless.

14. We have considered the law. It is our duty to fit the law into the fact to come to a definite finding. There is a big gap between the declaration simplicitor and relief in the garb of declaration. If a person makes a prayer to declare right, title or interest of a property in his favour then it can be construed as declaration simplicitor but when a plaintiff seeks any declaration to disentitle others' right into a property, such type of circumvent prayer cannot be treated to be declaration simplicitor. In other words, he is not asking any relief for himself but want to prevent his opponent from enjoying fruit of their property. Therefore, such type of relief is virtually in the nature of injunction at first with the nomenclature of the "declaration." Therefore, it is required for the Court to go into the real nature of dispute arising out of the plaint to ascertain the cause and incidental cause which helps it. A Will is execution of document of a testator to give his property to a person of his choice. Such Will will be enforceable only after the death of the testator. In some of the States of India, grant of probate by the appropriate court of law on the Will is compulsory and some of the State it is optional. In the State of U.P., obtain probate on the Will is optional, therefore, as soon as the testator dies and Will comes into light, it operates as a valuable instrument in favour of the person in whose favour property is devolved by such Will. If such person seeks a probate before the Court by filing it, no question of ad valorem court-fee will be applicable but it will be paid as soon as Court will grant such probate in his favour. In the present case, the defendant-respondent never approached to the Court to obtain a probate but enjoying the property as successor under the Will. Now, if such Will is declared by the Court as null and void, right of the person in the property or properties under the Will, will be

extinguished. Therefore, the principle of securing property under the Will will be attracted. Therefore, under no stretch of imagination we can hold and say that the suit can be entertained on the basis of the fixed court-fees.

15. Having so, we dismiss the appeal on contest on the legal principle at the stage of admission on the informal papers, as agreed upon, however, without imposing any cost. Consequential effect of the dismissal of the appeal is that the plaintiff is liable to pay ad valorem court-fees.

D.K. Arora, J.

I agree.