

**Q 1. What is declaratory decree? What are its essential elements? Discuss**

Ans 1 .DECLARATORY DECREES

(SECTIONS 34 & 35) A person entitled to any legal character or any right as to any property may seek a declaration from a court to that effect so that there are no adverse attack which could weaken that legal character or title. The declaration could be sought under Section 34, which reads as under

"34. Discretion of court as to declaration of status or right.--Any person entitled to any legal character; or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, 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 : Provided 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. Explanation.--A trustee of property is a "person interested to deny" a title adverse to the title of some one who is not in existence, and for whom, if in existence, he would be a trustee."

Requisites of a declaratory suit (Section 34)

In order to get relief by way of a decree the following essentials are to be proved by the plaintiff : (1) That at the time of the suit the plaintiff was entitled to

(i) any legal character; or

(ii) to any right as to any property. What has to be proved is that the plaintiff was entitled to either the legal character, or to any right as to any property and either of

them exclusively can be the basis of the suit.

A declaration under Section 34 can not be sought for a declaration regarding the subsistence of a contract between the parties as the same neither relates to any legal character, nor any right to property.?

(2) The suit can be instituted against any person denying or interested in denying the plaintiff's right to any legal character, or to any right as to any property.

A trustee of property is a "person interested to deny" a title adverse to the title of some one who is not in existence, and for whom, if in existence, he would be a trustee.3

The above mentioned provision may be explained through the following illustrations :

(a) A is lawfully in possession of certain land. The inhabitants of a neighbouring village claim a right of way across the land. A may sue for a declaration that they are not entitled to the right so claimed. (b) A bequeaths his property to B, C and D "to be equally divided amongst all and each of them, if living at the time of my death, then amongst their surviving children." No such children are in existence. In a suit against A's executor, the Court may declare whether B, C and D took the property absolutely, or only for their lives, and it may also declare the interests of the children before their rights are vested. (c) A covenants that, if he should at any time be entitled to property exceeding one lakh of rupees, he will settle it upon certain trusts. Before any such property accrues, or any persons entitled under the trusts are ascertained, he institutes a suit to obtain a declaration that the covenant is void for uncertainty. The Court may make the declaration. (d) A alienates to B property in which A has merely a life interest. The alienation is invalid as against C, who is entitled as reversioner. The Court may in a suit by C against A and B declare that C is so entitled. (e) The widow of a sonless Hindu alienates part of the property of which she is in possession as such. The person presumptively entitled to possess the property if he survives

her may, in a suit against alienee, obtain a declaration that the alienation was made without legal necessity and was therefore void beyond the widow's lifetime. (f) A Hindu widow in possession of property adopts a son to her deceased husband. The person presumptively entitled to possession of the property on her death without a son may, in a suit against the adopted son, obtain a declaration that the adoption was invalid. (g) A is in possession of certain property. B, alleging that he is the owner of the property, requires A to deliver it to him. A may obtain a declaration of his right to hold the property. (h) A bequeaths property to B for his life, with remainder to B's wife and her children, if any, by B, but if B dies without any wife or children to C. B has a putative wife, D, and children, but C denies that B and D were ever lawfully married. D and her children may, in B's lifetime, institute a suit against C and obtain therein a declaration that they are truly the wife and children of B.

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Plaintiff to prove his title to property for declaration and consequential relief

In *S. Madasamy v. A.M. Arjuna Raja*, it has been held that in a suit for declaration of title and consequential injunction, the burden is on the plaintiff to prove his right and possession over property. If the plaintiff fails to prove his clear title to property he is not entitled to such declaration and the consequential injunction.

If oral and documentary evidence indicates that the defendant had actual possession of property and had constructed building over property in dispute, the plaintiff can not obtain declaration etc. unless he proves his right to the possession over property.

#### Discretion of the Court

The Court has a discretion to make declaration of status or right, claimed under Section 34. The Court is not bound to grant a declaratory decree in favour of the plaintiff in all cases where such a suit is validly brought. The court may, in its discretion make a declaration that the plaintiff is entitled to the same.

In Smt. Suman Mahajan v. Kusum Sandhu, one Smt. Gobind Kaur executed a duly registered Will dated 14-2-84 whereby she bequeathed certain property in favour of the plaintiff, Smt. Kusum Sandhu, who was her daughter-in-law, Smt. Gobind Kaur died on

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wi 29-9-1986, and thereby the plaintiff became the absolute owner of the said property.

The plaintiff went abroad in June 1988 for sometime. In her absence one of the defendants, who happened to be the tenant of a part of that property, took unauthorised possession of the portion which was with the plaintiff and started raising construction thereon.

In a suit for possession by the plaintiff the defendant contended that the deceased had entered into an agreement to sell that property to the defendant and the defendant had paid due consideration for the same. The defendant failed to prove the fact of agreement and also the payment of alleged consideration.

It was held that the plaintiff was entitled to the said property and also to regain the possession thereof.)

In Life Insurance Corporation of India v. Tufan Mondal, the nominee under an insurance policy for a suit for declaration under Section 34 of the Specific Relief Act that he was entitled to receive money under the policy of the deceased.

It may be noted that under Section 39 of the Insurance Act, 1938 a nominee is entitled to receive the payment. It does not mean that the money will belong to the nominee. The amount will belong to the legal heirs of the deceased.

In the instant case the nominee's suit was for mere declaration of his right to receive the insurance amount and it did not touch the right, title and interest of the legal heirs in respect of the money received by the nominee.

It was held that the suit was maintainable in law and the plaintiff was entitled to the declaration prayed for.

In the suit for the grant of a declaratory decree, the plaintiff need not ask for any further relief. However according to Proviso to Section 34 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. The object of the proviso is that if the plaintiff is entitled to legal character or to any right as to property as well some consequential relief directly flowing from such right or title, he must claim consequential relief in the same suit, so that multiplicity of suits is avoided and the matter gets settled once for all.

If the plaintiff is able to seek further relief at the time of Institution of the suit and he omits to do so, it is mandatory for the court not to make declaration. The plaintiff may omit to claim further relief to avoid stamp duty, or due to some other' reason. In such a case the court should be satisfied that the plaintiff ought to seek

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Dismissal of the suit without consideration on merit is erroneous

In *M/s. Anant Associates v. Nagpur Improvement Trust*,<sup>5</sup> dismissal of the suit without considering the same on merit is bad in law and should be considered again.

In the above mentioned case there was suit for declaration regarding certain property. The appellant also filed an application for temporary injunction. The trial court not only dismissed the application for temporary injunction but also dismissed the suit itself. On the date of dismissal of the suit neither any issues had been framed nor any evidence had been led.

The dismissal of the suit was held to be erroneous and the matter was remitted back to the trial court for deciding the suit in accordance with law.

Executing court cannot grant consequential relief v LIf the plaintiff did not claim consequential relief and the suit

is decreed accordingly, the executing court cannot grant the relief which the plaintiff had not claimed at suit level. In *State of M.P. v. Mangilal Sharma*, the plaintiff claimed a declaration that he was in the service of the State Government as he had not been informed that the resignation submitted by

him had been granted. The Court granted him a declaration that he continued to be in service. In the

suit for declaration the plaintiff had not claimed either arrears of salary or interest on the arrears. It was held that the executing court could not add or alter the decree and, therefore, could not grant arrears of salary and interest thereon to the plaintiff.,

Suit for declaration of title.—Where defendant had alleged that: it was government land. Entry in relevant column in 'pahanies' showed predecessor of plaintiff as pattedar and possessing right from year 1971. No steps were taken by Government at any point of time cancelling such entry: Entry in settlement register also showed the said predecessor-in-title as owner and pattedar. Held that such entry was evidence of right and title of person mentioned therein or as predecessor-in-title. Hence General Land Register could not be relief for establishing title of Government. As such suit was entitled to be decreed.

Where property in question was in the possession of charitable trust. It was purchased by adoptive mother of plaintiff in his name and given to the trust under valid trust deed. Plaintiff was minor at the time of purchase and he himself was party to trust deed and convenor of trust. No evidence showed that suit property was let out to trust by him. Documentary evidence showed that trust was in possession of said property and was paying property tax, electricity and water charges etc. Therefore plaintiff was not entitled to relief of declaration of title.?

Burden of proof in benami transaction. In suit for declaration of title averment that plaintiff had purchased the property in the name of his wife. There was failure of plaintiff, however, to prove that he had necessary funds or source for purchase of property at the time when transactions took place) It was specifically pleaded by him that he had purchased property for the benefit and enjoyment of his family which included his wife. Held, that plaintiff could not be declared to be owner of property nor further sale deed of property by his wife were sham and illegal.

Execution of sale deed whether could be called in question after prescribed period of limitation.-Where the document of sale deed was questioned on ground of fraud allegedly practiced by vendee. As such ground of fraud could not be proved, hence such document of sale shall only be treated as voidable one but ab initio void. For repudiation on such sale transaction, vendor must file suit under Article 59.-)

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Suit for declaration—Validity of sale of property due to legal necessity.—Where the sale deed in question was invalid and suit was filed by wife of deceased on ground that sale deed of ancestral property was without legal necessity. Plaintiff was one of the witnesses to register sale deed. There was averment by plaintiff that there was sufficient income for family to meet expenses. No documentary evidence was produced in support of such case and no supporting witness was examined by the plaintiff. Sale deed containing clear recitals about legal necessity but not suit was filed by plaintiff to set aside sale deed for period of four years. Held that bank account in which purchasers had deposited sale consideration was operated by plaintiff after death of her husband, as such, sale deed was not invalid.

Suit for declaration-Sale deed executed subsequently not binding on plaintiff.—Where the plaintiff had sought decree to effect that sale deed already executed by defendant No. 1 in favour of defendant No. (2) was illegal. Defendant N. 1 had executed sale deed in favour of plaintiff but later on refused to register the same on some pretext or other. Sub-Registrar in exercise of powers under Section 75 had ordered registration of sale deed in favour of plaintiff which was earlier in favour of plaintiff in point of time. As such, defendant No. 1 could not have executed and registered valid sale deed in favour of defendant No. 2, hence, any such, sale deed executed by him subsequently will not be binding on plaintiff.?

Suit for declaration and partition of suit property.—Where there was redistribution of properties under unregistered deed of partition according to which plaintiff was allotted suit property. In the revenue record extract plaintiff was shown in effective possession. Held that revenue extract carried presumptive value in law. As no convincing evidence was placed by defendant to rebut legal presumption, hence, finding of Court that plaintiff was in possession was proper.

Suit for declaration of ownership.-Where plaintiff, an old and illiterate person of weak eye-sight, was tricked by defendant to sign document that one he actually intended to sign so as to give up ownership of suit land. Defendant had obtained decree for playing fraud and misrepresentation.) Defendant had miserably failed to substantiate any of valid defences or his bona fides. Held that plaintiff could make a claim that document signed by him was non est factum."

(Suit for declaration of title and possession over ancestral property.-In the instant case for entitlement of L.Rs. to share in father's property, validity of marriage was questioned. First defendant was legally wedded wife of deceased and defendants 2 to 5 were their children. It was claimed by

plaintiffs that their mother and deceased were married 70 years back as per religious custom and they along with sixth defendant being children of deceased were entitled to share in suit property. Held that though there was no direct evidence of customary form of marriage, legal presumption of valid marriage between plaintiff's mother and deceased could not be ignored because of their long living as husband and wife and also that plaintiff's and sixth defendant being their children. Once there was presumption of marriage, their status as husband and wife could not be disturbed by subsequent marriage between the first defendant and deceased that could only be long after birth of plaintiffs and sixth defendant. As such, plaintiff and sixth defendant were also L.Rs. of deceased along with defendants 1 to 5 and were duly entitled to 1/8th share in the property.

Suit for declaration regarding joint possession maintainable.- Where suit was filed for declaration by plaintiffs that they were in joint possession of suit property with their father, brothers and sisters in equal shares. Permanent injunction against alienation was also sought. Held that such suit was maintainable and it was not necessary to claim possession.

de Suit for declaration that decree was obtained by playing fraud.—Where defendant's claim was that suit property was given to him by plaintiff under family settlement. Plaintiff and defendant were not related to each other in any way. Plaintiff in fact, had tried to transfer property in form of consent decree to avoid payment of stamp duty. Such transaction would not confer any confer any title on defendant. Moreover, decree which was collusive decree was not registered decree, hence, such decree was set aside being null and void.

Suit for declaration of title, right and interest in suit property and recovery of possession.-Where a coparcener property was purchased by plaintiff under valid sale deed from its owner who had major share in property/ Plaintiff was dispossessed of defendants claiming to have inherited share in coparcenary property from share of their mother. As per facts on record defendants had only 1/10th share in the entire property whereas owner from whom plaintiff had

Suit for declaration and permanent injunction in dispute over the lane between houses of plaintiff and defendant-Where the plaintiff claimed ownership over lane by virtue of registered sale deed as per the description of houses property in certified copy of house maps. It was conclusive and clinching evidence proving that plaintiff did not own and possess lane which was concluded in area of defendant. There was no strong evidence adduced by plaintiff to corroborate sale deed relief on by him. Reliance was placed by trial Court on certified of house maps from concerned authorities,

established that lane formed part and parcel of suit house of the defendant. The impugned judgment and order of the appellate Court, therefore, was quashed and set aside.

Suit for declaration of 1/3rd share with defendants as co-shares.-Where co-sharers were taken to be in joint possession. As such, it was not necessary for plaintiff to seek relief of possession. Suit was rightly held by Courts below as not barred by limitation.

Maintainability of suit for failure to claim further relief. Where in a suit by holder under agreement to sale against trespasser, relief of declaration of title, restoration of possession and injunction was claimed, held that such suit could not be said to be not tenable for failure to claim specific performance as such relief was not a "relief" which could be claimed against the defendant-trespasser.

Finding of Registrar in exercise of delegated powers whether amounts to findings of Court, question whether document was properly stamped or not and to determine the question, Registrar had to consider the nature of document, held that Registrar by recording the findings that document in question was "earnest money receipt" and not "agreement to sell" could not be said to have exceeded his brief. His finding could not be taken as adjudication of dispute. Therefore, application for review filed by the plaintiff had no merit.

Plea of adverse possession not tenable.—Where kist instalment receipt was shown to have been issued both in favour of plaintiff and defendant of same years. No conclusion could be drawn

Suit for declaration of title and possession.—Where the plaintiff had filed suit for declaration of ownership over a portion of land (mud wall) and possession of said portion after removal of construction raised by defendant on ground that defendant had encroached upon the said portion. Record showed that defendant was in possession of said portion even before purchase of land by plaintiff. Held that as report of local Commissioner was also in favour of defendant and construction raised by plaintiff was in accordance with arbitral award passed earlier, dismissal of suit was proper.

Validity of suit for declaration of title and injunction.—Where the plaintiff claimed his ownership over property by virtue of decree for partition passed in earlier suit. Defendant had not produced anything to prove their title over such property. They had admitted possession and ownership of plaintiff over suit land in reply to notice sent by plaintiff. Therefore, plaintiff was entitled to relief of declaration and defendants could not take advantage of the fact that



measurements of property on instant suit did not tally with the measurements of earlier suit for partition.<sup>3</sup>

Onus to prove title in suit for recovery of possession on basis of title.-In a suit for recovery of possession based on title it is for the plaintiff to prove his title and satisfy the Court that he, in law, is entitled to dispossess the defendant from his possession over the suit property and for possession to be restored with him. However, as held in *A Raghavamma and another v. Chenchamma and another*, there is an essential distinction between burden of proof and onus of proof; burden of proof lies upon a person who has to prove the fact and which never shifts. Onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence. In our opinion, in a suit for possession based on title once the plaintiff has been able to create a high degree of probability so as to shift the onus on the defendant it is for the defendant to discharge his onus and in the absence thereof the burden of proof lying on the plaintiff shall be held to have been discharged so as to amount

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**Q 2. What do you understand by rescission of contracts?**

Ans 2 .RESCISSION OF CONTRACTS  
(SECTIONS 27-30)

( When rescission of contract may be granted (Section 27(1))

Rescission means the termination or annulment of a contract.

Any person interested in a contract may sue to have it rescinded. Such rescission may be adjudged by the court in any of the following cases, namely :

(a) where the contract is voidable or terminable by the plaintiff; or (b) where the contract is unlawful for causes not apparent on its face and the defendant is more to blame than the plaintiff.<sup>1</sup>

Voidable contract

A voidable contract is an agreement which is enforceable at the option of one or more of the parties thereto, but not at the option of other or others. Thus, a voidable contract may be avoided at the option of one of the parties to the contract.

When is the contract voidable or terminable by the plaintiff

A contract is declared voidable under various provisions of the Indian Contract Act, 1872.

According to Section 19, when the consent to an agreement is caused by coercion, fraud' or misrepresentations the agreement is a contract voidable at the option of the party whose consent was so obtained. Similarly, when the consent of a party to the contract has been obtained by undue influence

the contract is voidable at the option of the party whose consent has been so obtained, under

the Contract Animatory breach

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Section 19-A of the Contract Act.

Similarly, in case of anticipatory breach of contract by one party, the other party to the contract may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

In the same way, in case the time of performance of a contract is of the essence of the contract, non-performance of the contract by one party in such specified time entitles the other to avoid the contract.<sup>2</sup>

Notice for rescission of contract

It has been noted above that under certain situations a party to the contract may avoid the contract. The party entitled to avoid or rescind a voidable contract may do so by a notice to the other party, or taking such steps as may be necessary under the circumstances of by the case. A voidable contract will be avoided only if the party having a right to do so avoids it. If instead, he affirms the contract then the contract will be binding on both the parties. Ordinarily, a notice to the other party of the intention to avoid the contract would suffice. If, however, the other party is not available then taking necessary steps which may be possible under the circumstances of the case would be enough. In *Car and Universal Finance Co. Ltd. v. Caldwell*, the purchaser of a car committed a fraud against the seller by making the payment through a cheque which was dishonoured. The seller wanted to avoid the contract and regain the possession from the buyer, but the buyer was not traceable. The seller immediately informed the police and also the Automobile Association about the same. Meanwhile the purchaser of the car sold it further to A, who had been acting in good faith. The question was whether A had purchased it after rescission of the contract by the seller, and if that was so then A could not have a good title to the car. It was held that even though the seller could not communicate, the rescission to the purchaser himself, information to the police and the Automobile Association had resulted in the rescission of the contract and, therefore, A did not get a good title to the car.

A person entitled to avoid a contract may sue the other party to have the contract rescinded by a court, under the Specific Relief Act, 1963.

| When a party entitled to avoid a contract does so in unambiguous terms the agreement becomes void and puts the parties in a position in which they

stood before the contract was made. The position was thus stated by Lord Atkinson in *Abram Steamship Co. v. Westville Shipping Company Ltd.*

"Where one party to a contract expresses by word or act in an unequivocal manner that by reason of fraud or essential error of a material kind inducing him to enter into the contract he has resolved to rescind it, and refuses to be bound by it, the expression of his election, if justified by the facts, terminates the contract, puts the parties in status quo ante and restores things, as between them, to the position in which they stood before the contract was entered into."

Limits to the right of rescission

The right of rescission of the contract is subject to the following limitations. In such situations the law may not permit the exercise of the right of rescission of contract.

(1) When the contract has been affirmed or ratified by the plaintiff (Section 27(2)(a))

The court may refuse to rescind the contract where the plaintiff has expressly or impliedly ratified the contract.<sup>2</sup>

There are two alternatives open to a party having a right to avoid a contract, either to rescind it, or to affirm it. If the contract is rescinded it becomes void and unenforceable. On the other hand, if it is affirmed then it is a valid and binding contract against both the parties. Section 19 of the Contract Act, which deals with the right of rescission of a contract where the consent of a party has been obtained by misrepresentation or fraud further states :

"A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representation made had been true."

The affirmation of a contract may be made either expressly, or implicitly or it could be inferred from a person's conduct. In *Long v. Lloyd* A sold his lorry to B by making a false representation that the lorry was in "excellent condition". On the lorry's first journey B

discovered serious defects in the lorry. He did not rescind the contract, but instead accepted A's offer of half the cost of repairs. The lorry completely broke in the next journey and then B wanted to rescind the contract. It was held that B, by accepting the offer of sharing the cost of repairs by A and thereafter continuing using the car, had affirmed the contract and he had now no right to rescind it. Similarly, if a patient makes a gift to her physician

during the course of her treatment and then after the end of the fiduciary relationship she prefers to abide by her gift, the gift is a valid one.

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Lapse of time

A person having a right to avoid the contract must do so within a reasonable time. Failing to exercise this right in time may mean affirmation of the contract. If a person transfers his property to another person while under a spiritual influence, but does not take steps to take back the property for six years after such influence has ceased, the right to retrieve the property comes to an end.<sup>2</sup> Similarly, if a person purchasing a picture on the basis of an innocent but false representation that it has been painted by a particular renowned artist, wants to avoid the contract after five years of its purchase, the rescission would not be allowed.<sup>3</sup>

(2) When the parties can not be substantially restored to their original position (Section 27(2)(b)]

The court may also refuse to rescind the contract

Where, owing to change of circumstances which has taken place since the making of the contract (not being due to any act of the defendant himself), the parties cannot be substantially restored to the position in which they stood when the contract was made.

When a party wants to avoid the contract he must do so, so long as the parties to the contract can be placed in the same position in which they were before the contract was made. If restitution in integrum is not possible there can be no rescission. For example, A purchases a suit piece from B under a contract voidable at A's option. A gets the piece converted into a suit. A's right to avoid the contract cannot be exercised because he will not be in a position to return the suit piece. In a contract of sale of goods if the buyer has a right to avoid the contract because of breach of a condition, the buyer's right of rejecting those goods comes to an end if the buyer has !

((3) When third parties have acquired rights (Section 27(2)(c)]

The court may refuse to rescind the contract

Where third parties have, during the subsistence of the contract, acquired rights in good faith without notice and for value.\*

The right of rescission may be gone if before the contract has been rescinded some third party has acquired a right in the subject matter of the contract. A voidable contract is valid until avoided and it becomes void only after it has been avoided. There is a possibility that so long as the contract

has not been avoided, there could be creation of an interest in favour of a third party.

The position may be explained by referring to the following provisions contained in Section 29 (Indian) Sale of Goods Act :

"When the seller of goods has obtained possession thereof under a contract voidable under Section 19 or Section 19-A of the Indian Contract Act, 1872, but the contract has not

(4) Where part of a non-severable contract is sought to be rescinded (Section 27(1)(d))

The Court may refuse to rescind the contract

Where only a part of the contract is sought to be rescinded and such part is not severable from the rest of the contract.<sup>2</sup>

When a person sues for rescission of a contract he must get the whole of it rescinded, when the parts of that contract constitute one inseparable whole. When one part of the contract is not separable from the rest of the contract, the law does not permit rescission of only a part of the contract.

Rescission not to be exercised arbitrarily. It is usually said that the right of rescission cannot be exercised arbitrarily. This statement is applicable to a case where the vendor rescinds on the ground that he is not willing to comply with the requisitions of the vendee. Inability to comply with the requisition stands on a different footing.

Duddel v. Simpsons, : In this case the vendor was entitled to an under-lease for 24 years less three days. The property was put up for sale as held under lease for 24 years. The vendor relied upon the promise of the person entitled to the term of three days to concur in the sale. Subsequently he could not obtain the concurrence of that person and so rescinded the contract. It was held that the rescission was proper. Holding that there was no question of the arbitrary exercise of the power of rescission, the Court observed : "The question here turns upon the vendor's inability."

Court has discretion to extend time under Section 28 of S.R. Act or under Section 148 of C.P.C.-Where decree for specific performance of sale was granted in favour of respondent. The two defendants (who have filed two different revision petitions) were directed to execute the sale deed after receiving balance sale consideration within two months failing which decree was to be executed by Court as per terms of decree. Decree holder was required to deposit in Court, balance of sale consideration within two months. However, consequence of non-deposit within time mentioned was not mentioned in decree. Held that under such circumstances Court had

discretion to extend time under Section 28 of the Specific Relief Act or under Section 148 of C.P.C. As such, there was no error in order impugned in civil revisions whereby trial

n and so rescindly he could not obtain of three days to

of respondents-agreement in question would stand rescinded.

Application for rescission of contract not allowed.-Where there was deposit of balance consideration money by purchaser as ordered by Court. Suit by purchaser was decreed and application was filed by purchaser for withdrawing the said amount. Said application was rejected by the Court on the ground that without filing execution petition to execute the decree, he could not withdraw the said amount. As no attempt thereafter had been made by the applicant to file execution petition, therefore, vendor could not be held to have not complied with terms of decree and as such application for rescission of contract could not be allowed.2

Application against dispossession maintainable.-Application against dispossession under C.P.C. Order XXI, Rule 99 was independent application. Filing of such application was not dependent upon pendency of any execution proceeding. Dispute had arisen out of orders of delivery of possession pursuant to decree of specific performance of contract passed by Court. Held that such application was maintainable.3

Extension of time by Court in decree for specific performance of contract.-Where there were direction by Court to plaintiff to deposit amount within the specified period and in failure to do so, the suit would be dismissed. In the instant case as plaintiff failed to deposit the amount within specified period, it was held that Court could extend time for depositing of such amount.\*

Rescission of contract not allowed in decree of specific performance.-Trial Court while decreeing suit had directed defendant to execute sale deed on receipt of balance consideration. No time had been fixed by trial Court for deposit of money at the time of passing of decree. No consequences were mentioned in case of default. Plaintiff had deposited balance consideration within extended period of time allowed by Executing Court which was also trial Court. Although plaintiff had deposited money, even then defendants were not ready to perform their part of contract by executing sale deed. Held that no case of rescission of contract was made out. Moreover, plaintiff was ready to deposit balance even during pendency of suit.5

**Q 3. What do you understand by declaratory decree? Mention the circumstances under article a declaratory decree may be passed.**

**Ans 3. DECLARATORY DECREES**

(SECTIONS 34 & 35) A person entitled to any legal character or any right as to any property may seek a declaration from a court to that effect so that there are no adverse attack which could weaken that legal character or title. The declaration could be sought under Section 34, which reads as under

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A trustee of property is a "person interested to deny" a title adverse to the title of some one who is not in existence, and for whom, if in existence, he would be a trustee.<sup>3</sup>

The above mentioned provision may be explained through the following illustrations :

(a) A is lawfully in possession of certain land. The inhabitants of a neighbouring village claim a right of way across the land. A may sue for a declaration that they are not entitled to the right so claimed. (b) A bequeaths his property to B, C and D "to be equally divided amongst all and each of them, if living at the time of my death, then amongst their surviving children." No such children are in existence. In a suit against A's executor, the Court may declare whether B, C and D took the property absolutely, or only for their lives, and it may also declare the interests of the children before their rights are vested. (c) A covenants that, if he should at any time be entitled to property exceeding one lakh of rupees, he will settle it upon certain trusts. Before any such property accrues, or any persons entitled under the trusts are ascertained, he institutes a suit to obtain a declaration that the covenant is void for uncertainty. The Court may make the declaration, (d) A alienates to B property in which A has merely a life interest. The alienation is invalid as against C, who is entitled as reversioner. The Court may in a suit by C against A and B declare that C is

so entitled. (e) The widow of a sonless Hindu alienates part of the property of which she is in possession as such. The person presumptively entitled to possess the property if he survives

her may, in a suit against alienee, obtain a declaration that the alienation was made without legal necessity and was therefore void beyond the widow's lifetime. (f) A Hindu widow in possession of property adopts a son to her deceased husband. The person presumptively entitled to possession of the property on her death without a son may, in a suit against the adopted son, obtain a declaration that the adoption was invalid. (g) A is in possession of certain property. B, alleging that he is the owner of the property, requires A to deliver it to him. A may obtain a declaration of his right to hold the property. (h) A bequeaths property to B for his life, with remainder to B's wife and her children, if any, by B, but if B dies without any wife or children to C. B has a putative wife, D, and children, but C denies that B and D were ever lawfully married. D and her children may, in B's lifetime, institute a suit against C and obtain therein a declaration that they are truly the wife and children of B.

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Plaintiff to prove his title to property for declaration and consequential relief

In *S. Madasamy v. A.M. Arjuna Raja*, it has been held that in a suit for declaration of title and consequential injunction, the burden is on the plaintiff to prove his right and possession over property. If the plaintiff fails to prove his clear title to property he is not entitled to such declaration and the consequential injunction.

If oral and documentary evidence indicates that the defendant had actual possession of property and had constructed building over property in dispute, the plaintiff can not obtain declaration etc. unless he proves his right to the possession over property.

Discretion of the Court

The Court has a discretion to make declaration of status or right, claimed under Section 34. The Court is not bound to grant a declaratory decree in favour of the plaintiff in all cases where such a suit is validly brought. The court may, in its discretion make a declaration that the plaintiff is entitled to the same.

In *Smt. Suman Mahajan v. Kusum Sandhu*, one Smt. Gobind Kaur executed a duly registered Will dated 14-2-84 whereby she bequeathed certain

property in favour of the plaintiff, Smt. Kusum Sandhu, who was her daughter-in-law, Smt. Gobind Kaur died on

29-9-1986, and thereby the plaintiff became the absolute owner of the said property.

The plaintiff went abroad in June 1988 for sometime. In her absence one of the defendants, who happened to be the tenant of a part of that property, took unauthorised possession of the portion which was with the plaintiff and started raising construction thereon.

In a suit for possession by the plaintiff the defendant contended that the deceased had entered into an agreement to sell that property to the defendant and the defendant had paid due consideration for the same. The defendant failed to prove the fact of agreement and also the payment of alleged consideration.

It was held that the plaintiff was entitled to the said property and also to regain the possession thereof.

In Life Insurance Corporation of India v. Tufan Mondal, the nominee under an insurance policy for a suit for declaration under Section 34 of the Specific Relief Act that he was entitled to receive money under the policy of the deceased.

It may be noted that under Section 39 of the Insurance Act, 1938 a nominee is entitled to receive the payment. It does not mean that the money will belong to the nominee. The amount will belong to the legal heirs of the deceased.

In the instant case the nominee's suit was for mere declaration of his right to receive the insurance amount and it did not touch the right, title and interest of the legal heirs in respect of the money received by the nominee.

It was held that the suit was maintainable in law and the plaintiff was entitled to the declaration prayed for.

In the suit for the grant of a declaratory decree, the plaintiff need not ask for any further relief. However according to Proviso to Section 34 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. The object of the proviso is that if the plaintiff is entitled to legal character or to any right as to property as well some consequential relief directly flowing from such right or title, he must claim consequential relief in the same suit, so that multiplicity of suits is avoided and the matter gets settled once for all.

If the plaintiff is able to seek further relief at the time of Institution of the suit and he omits to do so, it is mandatory for the court not to make declaration.

The plaintiff may omit to claim further relief to avoid stamp duty, or due to some other reason. In such a case the court should be satisfied that the plaintiff ought to seek

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Dismissal of the suit without consideration on merit is erroneous

In *Ms. Anant Associates v. Nagpur Improvement Trust*, dismissal of the suit without considering the same on merit is bad in law and should be considered again.

In the above mentioned case there was suit for declaration regarding certain property. The appellant also filed an application for temporary injunction. The trial court not only dismissed the application for temporary injunction but also dismissed the suit itself. On the date of dismissal of the suit neither any issues had been framed nor any evidence had been led.

The dismissal of the suit was held to be erroneous and the matter was remitted back to the trial court for deciding the suit in accordance with law.

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Executing court cannot grant consequential relief v Lf the plaintiff did not claim consequential relief and the suit

is decreed accordingly, the executing court cannot grant the relief which the plaintiff had not claimed at suit level. In *State of M.P. v. Mangilal Sharma*, the plaintiff claimed a declaration that he was in the service of the State Government as he had not been informed that the resignation submitted by him had been granted. The Court granted him a declaration that he continued to be in service. In the

suit for declaration the plaintiff had not claimed either arrears of salary or interest on the arrears. It was held that the executing court could not add or alter the decree and, therefore, could not grant arrears of salary and interest thereon to the plaintiff.,

Suit for declaration of title.—Where defendant had alleged that it was government land. Entry in relevant column in 'pahanies' showed predecessor of plaintiff as pattedar and possessing right from year 1971. No steps were taken by Government at any point of time cancelling such entry: Entry in settlement register also showed the said predecessor-in-title as owner and pattedar. Held that such entry was evidence of right and title of person mentioned therein or as predecessor-in-title. Hence General Land

Register could not be relief for establishing title of Government. As such suit was entitled to be decreed.

Where property in question was in the possession of charitable trust. It was purchased by adoptive mother of plaintiff in his name and given to the trust under valid trust deed. Plaintiff was minor at the time of purchase and he himself was party to trust deed and convenor of trust. No evidence showed that suit property was let out to trust by him. Documentary evidence showed that trust was in possession of said property and was paying property tax, electricity and water charges etc. Therefore plaintiff was not entitled to relief of declaration of title?

| Burden of proof in benami transaction. In suit for declaration of title averment that plaintiff had purchased the property in the name of his wife. There was failure of plaintiff, however, to prove that he had necessary funds or source for purchase of property at the time when transactions took place) It was specifically pleaded by him that he had purchased property for the benefit and enjoyment of his family which included his wife. Held, that plaintiff could not be declared to be owner of property nor further sale deed of property by his wife were sham and illegal.

Execution of sale deed whether could be called in question after prescribed period of limitation.-Where the document of sale deed was questioned on ground of fraud allegedly practiced by vendee. As such ground of fraud could not be proved, hence such document of sale shall only be treated as voidable one but ab initio void. For repudiation on such sale transaction, vendor must file suit under Article 59.)

Suit for declaration—Validity of sale of property due to legal necessity.—Where the sale deed in question was invalid and suit was filed by wife of deceased on ground that sale deed of ancestral property was without legal necessity. Plaintiff was one of the witnesses to register sale deed. There was averment by plaintiff that there was sufficient income for family to meet expenses. No documentary evidence was produced in support of such case and no supporting witness was examined by the plaintiff. Sale deed containing clear recitals about legal necessity but not suit was filed by plaintiff to set aside sale deed for period of four years. Held that bank account in which purchasers had deposited sale consideration was operated by plaintiff after death of her husband, as such, sale deed was not invalid.

Suit for declaration Sale deed executed subsequently not binding on plaintiff.—Where the plaintiff had sought decree to effect that sale deed already executed by defendant No. 1 in favour of defendant No. (2) was illegal. Defendant N. 1 had executed sale deed in favour of plaintiff but later

on refused to register the same on some pretext or other. Sub-Registrar in exercise of powers under Section 75 had ordered registration of sale deed in favour of plaintiff which was earlier in favour of plaintiff in point of time. As such, defendant No. 1 could not have executed and registered valid sale deed in favour of defendant No. 2, hence, any such, sale deed executed by him subsequently will not be binding on plaintiff.?

Suit for declaration and partition of suit property.—Where there was redistribution of properties under unregistered deed of partition according to which plaintiff was allotted suit property. In the revenue record extract plaintiff was shown in effective possession. Held that revenue extract carried presumptive value in law. As no convincing evidence was placed by defendant to rebut legal presumption, hence, finding of Court that plaintiff was in possession was proper.

Suit for declaration of ownership.-Where plaintiff, an old and illiterate person of weak eye-sight, was tricked by defendant to sign document that one he actually intended to sign so as to give up ownership of suit land. Defendant had obtained decree for playing fraud and misrepresentation.) Defendant had miserably failed to substance any of valid defences or his bona fides. Held that plaintiff could make a claim that document signed by him was non est factum."

(Suit for declaration of title and possession over ancestral property. In the instant case for entitlement of L.Rs. to share in father's property, validity of marriage was questioned. First defendant was legally wedded wife of deceased and defendants 2 to 5 were their children. It was claimed by plaintiffs that their mother and deceased were married 70 years back as per religious custom and they along with sixth defendant being children of deceased were entitled to share in suit property. Held that though there was no direct evidence of customary form of marriage, legal presumption of valid marriage between plaintiff's mother and deceased could not be ignored because of their long living as husband and wife and also that plaintiff's and sixth defendant being their children. Once there was presumption of marriage, their status as husband and wife could not be disturbed by subsequent marriage between the first defendant and deceased that could only be long after birth of plaintiffs and sixth defendant. As such, plaintiff and sixth defendant were also L.Rs. of deceased along with defendants 1 to 5 and were duly entitled to 1/8th share in the property.

Suit for declaration regarding joint possession maintainable.- Were suit was filed for declaration by plaintiffs that they were in joint possession of suit property with their father, brothers and sisters in equal shares. Permanent

injunction against alienation was also sought. Held that such suit was maintainable and it was not necessary to claim possession.

de Suit for declaration that decree was obtained by playing fraud.—Where defendant's claim was that suit property was given to him by plaintiff under family settlement. Plaintiff and defendant were not related to each other in any way. Plaintiff in fact, had tried to transfer property in form of consent decree to avoid payment of stamp duty. Such transaction would not confer any title on defendant. Moreover, decree which was collusive decree was not registered decree, hence, such decree was set aside being null and void.

Suit for declaration of title, right and interest in suit property and recovery of possession.—Where a coparcener property was purchased by plaintiff under valid sale deed from its owner who had major share in property/ Plaintiff was dispossessed of defendants claiming to have inherited share in coparcenary property from share of their mother. As per facts on record defendants had only 1/10th share in the entire property whereas owner from whom plaintiff had

Suit for declaration and permanent injunction in dispute over the lane between houses of plaintiff and defendant—Where the plaintiff claimed ownership over lane by virtue of registered sale deed as per the description of houses property in certified copy of house maps. It was conclusive and clinching evidence proving that plaintiff did not own and possess lane which was concluded in area of defendant. There was no strong evidence adduced by plaintiff to corroborate sale deed relief on by him. Reliance was placed by trial Court on certified of house maps from concerned authorities, established that lane formed part and parcel of suit house of the defendant. The impugned judgment and order of the appellate Court, therefore, was quashed and set aside.

Suit for declaration of 1/3rd share with defendants as co-shares.—Where co-sharers were taken to be in joint possession. As such, it was not necessary for plaintiff to seek relief of possession. Suit was rightly held by Courts below as not barred by limitation.

Maintainability of suit for failure to claim further relief. Where in a suit by holder under agreement to sale against trespasser, relief of declaration of title, restoration of possession and injunction was claimed, held that such suit could not be said to be not tenable for failure to claim specific performance as such relief was not a "relief" which could be claimed against the defendant-trespasser.

Finding of Registrar in exercise of delegated powers whether amounts to findings of Court, question whether document was properly stamped or not and to determine the question, Registrar had to consider the nature of document, held that Registrar by recording the findings that document in question was "earnest money receipt" and not "agreement to sell" could not be said to have exceeded his brief. His finding could not be taken as adjudication of dispute. Therefore, application for review filed by the plaintiff had no merit.<sup>5</sup>

Plea of adverse possession not tenable.—Where kishit instalment receipt was shown to have been issued both in favour of plaintiff and defendant of same years. No conclusion could be drawn

Suit for declaration of title and possession.—Where the plaintiff had filed suit for declaration of ownership over a portion of land (mud wall) and possession of said portion after removal of construction raised by defendant on ground that defendant had encroached upon the said portion. Record showed that defendant was in possession of said portion even before purchase of land by plaintiff. Held that as report of local Commissioner was also in favour of defendant and construction raised by plaintiff was in accordance with arbitral award passed earlier, dismissal of suit was proper.

Validity of suit for declaration of title and injunction.—Where the plaintiff claimed his ownership over property by virtue of decree for partition passed in earlier suit. Defendant had not produced anything to prove their title over such property. They had admitted possession and ownership of plaintiff over suit land in reply to notice sent by plaintiff. Therefore, plaintiff was entitled to relief of declaration and defendants could not take advantage of the fact that measurements of property on instant suit did not tally with the measurements of earlier suit for partition.<sup>3</sup>

onus to prove title in suit for recovery of possession on basis of title.—In a suit for recovery of possession based on title it is for the plaintiff to prove his title and satisfy the Court that he, in law, is entitled to dispossess the defendant from his possession over the suit property and for possession to be restored with him. However, as held in *A Raghavamma and another v. Chenchamma and another*, there is an essential distinction between burden of proof and onus of proof; burden of proof lies upon a person who has to prove the fact and which never shifts. Onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence. In our opinion, in a suit for possession based on title once the plaintiff has been able to create a high degree of probability so as to shift the onus on the defendant it is for the defendant to discharge his onus and in the absence thereof the



burden of proof lying on the plaintiff shall be held to have been discharged so as to amount

Effect of declaration (Section 35)

According to Section 35, a declaration made under this Chapter is binding only on the parties to the suit, persons claiming through them respectively, and where any of the parties are trustees, on the persons for whom, if in existence at the date of the declaration, such parties would be trustees.

The declaration operates as a bar only between the parties to the suit and their privies. It is not binding on other persons. The provision may be explained through the following illustration? :

A a Hindu in a suit to which B, his alleged wife, and her mother, are defendants, seeks a declaration that his marriage was duly solemnized and an order for the restitution of his conjugal rights. The Court makes the declaration and order. C, claiming that B is his wife, then sues A for the recovery of B. The declaration made in the former suit is not binding upon C.

In SNP Shipping Services Pvt. Ltd. v. World Tanker Carrier Corp., it has been held that by virtue of Section 35 of the Specific Relief Act, declaration given under Section 34 is binding only between the parties. It is a declaration in personam, and not in rem.)

Declaration made under Section 34 are declaration in personam only.—The declaration given under Section 34 of the Specific Relief Act, 1963 is a declaration in personam and not in rem so such declaration given is binding only between parties."