## APPELLATE CIVIL.

*Before Mukerji and S. K. Ghose JJ.*

1933

*Aug.* 23, 24, 28.

HEMCHANDRA NASKAR

*v.*

NARENDRANATH BASU.*

*Execution—Compromise decree—Injunction—Prohibitory injunction, if may be enforced in execution—Illustration to a section, Use of—Code of Civil Procedure (Act V of 1908), O. XXI, r. 32.*

Where by the terms of settlement of a consent decree it was provided, *inter alia*, that, except eight specified boat-passages, the defendants will not be competent to open any boat-passage or water-passage, *etc.*, *etc.*,

*held*, there was no agreement that the court would issue an injunction and the compromise decree cannot be read as containing an injunction but it is merely a declaratory decree.

*Held*, also, that if a simple prohibitory injunction is disobeyed, a fresh cause of action arises for which adequate remedy, either by a mandatory injunction or in some other way, has to be sought for in a suit and that, in such a case, clause 5 of Order XXI, rule 32 of the Civil Procedure Code has no application.

*Sachi Prasad Mukherjee* v. *Amarnath Roy Chowdhuri* (1) dissented from.

*Goswami Gordhan Lalji* v. *Goswami Maksudan Ballabh* (2) relied on.

Illustrations are no part of the section but they are helpful in the working and application of the statute.

*Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark* (3) relied on.

SECOND APPEAL by the plaintiffs.

The material facts of the case appear from the judgment.

*H. D. Bose* (with him *Bijankumar Mukherji* and *Biswanath Naskar*) for the appellants. If, from the terms of the decree, it is clear that the intention was to order an injunction, it is immaterial whether the word "injunction" was used or not. Where the plaintiff has in law the right to enforce the terms of

*Appeal from Appellate Order, No. 250 of 1933, against the decree of T. J. Y. Roxburgh, District Judge of 24-Parganâs, dated May 3, 1933, reversing the order of Basantakumar Ray, First Subordinate Judge of 24-Parganâs, dated Sept. 16, 1932.

(1) (1918) I.L.R. 46 Calc. 103. (2) (1918) I. L. R. 40 All. 648.
(3) (1916) L. R. 43 I. A. 256.

a compromise by execution, it is irrelevant that the terms of settlement did not state that the terms could be so enforced.

*Brajalal Chakrabarti* (with him *Radhabinode Pal* and *Premranjan Ray Chaudhuri*) for the respondents. The fact that the terms of settlement did not mention enforcing the right to close up the extra water-passages in future shows that the parties intended that part of the decree to be merely declaratory. It was merely a contract between the parties.

*Cur. adv. vult.*

MUKERJI J. The facts which have given rise to this appeal are quite simple and the question which falls for determination therein is equally so.

The two parties are owners of lands on opposite sides of a river called Sumed Giri. In 1923, the appellants and others, as plaintiffs, sued the respondents, alleging that the latter had made openings at thirty-one places in the bund on the western bank of the river in order to convert their cultivable lands into fisheries and had thereby caused injury to the fisheries which the plaintiffs had, from a long time before, on the opposite bank. The substantial prayers in the plaint were the following :—

(*ka*) a declaration in favour of the plaintiffs affirming their right and negativing the right of the defendants to take water from the river ; (*kha*) a mandatory injunction on the defendants to close the thirty-one openings they had made ; and (*ga*) a permanent injunction against the defendants restraining them from diverting the water and so the fish on to their lands.

The suit ended in a compromise which was embodied in a petition, in which it was prayed that a decree in accordance with its terms might be passed. The decree that was passed purported to be on the basis of the terms contained in the petition, and made the petition a part of it. By this petition the parties agreed that out of the thirty-one passages only eight which were specified should be retained. It was further provided :—

Besides the said eight boat-passages the additional boat-passages and water-passages excavated by the Basu defendants from the river Sumed Giri

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shall be closed by them within fifteen days from the date of this *solenâmâ*. If they fail to do so the plaintiff will be competent to have them closed on the strength of this *solenâmâ* decree with the help of the court. Save and except the said eight boat-passages they will not be competent to open any boat-passage or water-passage or draw water by any other means from the river Sumed Giri.

It is the decree-holders' case that the openings with the exception of the eight that were to be maintained were closed by the judgment-debtors, but that of late the latter have again opened some thirty passages in the place of the eight. They accordingly applied to have the openings, in excess of the eight, closed by execution of the decree. They prayed—

The said judgment-debtors having opened about thirty water-passages in place of eight, they are bound to close all the remaining water-passages keeping eight of them. As the judgment-debtors have not done so, it is prayed that a *nâzir* may be deputed by the court to have all the water-passages over and above the eight in respect of the *jalkars* belonging to the defendants which lie on the west side of the river Sumed Giri and within the boundaries given in the schedule below filled up with earth, and that all costs in respect thereof as well as for execution may be realised from the defendants.

Amongst the objections that were taken to the execution of the decree the one that concerns us at this stage is the objection that the decree is not executable in the manner prayed for as it was not a decree for an injunction, but a decree embodying a contract between the parties and that, to the extent that it did so, it was but a declaratory one. The Subordinate Judge overruled this objection. He held—

It was urged that a decree for a permanent injunction could only be passed in Forms Nos. 14 to 16 in Appendix D of the First Schedule of the Code of Civil Procedure relating to decrees. It is no doubt true that the compromise decree in this case has not been passed in any of the forms indicated in Appendix D, but I do not think that mere omission on the part of the court to pass the decree in one of the abovementioned forms is at all sufficient for holding that the decree passed in suit No. 178 of 1923 on compromise is not a decree for a perpetual injunction when I am fully satisfied from a perusal of the plaint and the decree that it is really a decree for a perpetual injunction. In construing the decree we must look to the substance and not the form of the decree. For the reasons stated above, I have no hesitation in holding that the decree passed in Suit No. 178 of 1923 was a decree for a permanent injunction. In this view of the case the decree-holders are perfectly entitled to execute the decree in the manner prayed for under clause 5 of rule 32 of Order XXI of the Code.

The District Judge, on appeal by the judgment-debtors, held that there was no permanent injunction

to execute and so the proceedings in execution must fail. He, however, ordered the proceedings to be treated as a suit on a contract embodied in the *solenâmâ* decree and remanded the case to the lower court to be treated on that footing.

At the outset, I may observe that I am not inclined to agree in the view expressed by Richardson J. (concurrence in which was withheld by Beachcroft J.) in the case of *Sachi Prasad Mukherjee* v. *Amarnath Roy Chowdhuri* (1), that clause 5 of Order XXI, of rule 32 applies to prohibitory as well as mandatory injunctions. With all deference to the learned Judge, I am of opinion that, notwithstanding that the word "injunction" is used in clause (*5*) without any qualification or restriction, that clause cannot be read as embracing prohibitory injunctions. The clause as well as the illustration appended to it make it, to my mind, perfectly clear that it is the act required to be done by the mandatory injunction that is "the act "required to be done" within the meaning of the clause. Illustrations no doubt are no part of the section, but they have been expressed by the legislature as helpful in the working and application of the statute and their usefulness in that respect should not be impaired [see *Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark* (2)]. Moreover, Order XLII, rule 30 of the English Rules from which this rule has been borrowed with a slight change of wording applies only to *mandamus*, or mandatory order, injuction or judgment, and there the expression "act required to be done" has the aforesaid limited meaning. Under the English Rules the mode of enforcing a prohibitory injunction is laid down in rule 7 of Order XLII, and is by attachment or committal, attachment there meaning, of course, of the person and not of the property. I am of opinion that while Order XXI, rule 32, clauses (*1*) (*2*) and (*3*) apply to both classes of injunctions and enable the decree-holder to put the judgment-debtor into civil prison

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and to attach the judgment-debtor's property and by these means to compel him to obey the decree, clause (*5*) has no application to the case of a simple prohibitory injunction. The provisions of clauses (*1*) (*2*) and (*3*) are highly penal in their character and they are intended to punish the defendant for disobedience of the decree and are not intended to be a satisfaction of the decree so as to prevent the decree-holder from taking further steps. In the case of a mandatory injunction clause (*5*) would often give the decree-holder a complete remedy. But if a simple prohibitory injunction is disobeyed, a fresh cause of action arises for which adequate remedy, either by a mandatory injunction or in some other way has to be sought for in a suit. I am not prepared to hold that when a prohibitory injuction is disobeyed the executing court is competent to substitute therefor a mandatory injunction of a suitable character, even under the inherent powers which are reserved to courts under section 151 of the Code of Civil Procedure. The limited meaning that I am disposed to put upon clause (*5*) is what I think was in the minds of the learned Judges of the Allahabad High Court when they made the observation in the case of *Goswami Gordhan Lalji* v. *Goswami Maksudan Ballabh* (1), at the top of page 652.

But a still greater difficulty which I find in the appellants' way is that I cannot read the decree which they are seeking to execute as a decree for an injunction at all. The word "injunction" does not occur anywhere in the *solenâmâ* nor at any place in the petition asking for a decree thereon. Nor indeed did the decree, in my opinion, purport to think of an injunction at all. An injunction is an order of the court which, no doubt, may be passed by consent of the parties and without a judicial determination of the circumstances justifying it—and in this respect I would differ from the view which the learned District Judge has taken,—but after all it must be

(1) (1918) I. L. R. 40 All. 648, 652.

passed by the court as its own order, disobedience of which would bring on the consequences that the statute provides for. I am unable to read the *solenâmâ* as disclosing any intention on the part of the parties that the court would make such an order. The court passed the decree on the basis of the *solenâmâ* and incorporated the *solenâmâ* as a part of the decree. It had no right to add one jot or tittle to nor could it make the slightest variation in the terms agreed upon between the parties. It is one thing for the parties to agree that one party shall have no right to, or shall not be able to keep or make more openings than eight, and quite a different thing for them to agree that the court should make an order against that party prohibiting him from keeping or making more openings than eight. An agreement to the former effect does not necessarily mean an agreement to the latter effect; the two are wide apart. I find it impossible to hold either that there was an agreement that the court would make an injunction or that the court in fact did so.

It has been argued that if the intention of the parties was not to have an injunction mandatory as well as prohibitory, then were the parties agreeing to something that would be utterly useless to the plaintiffs? Because, so far also as the closing down of the then existing openings in excess of the eight is concerned, there was no mandatory injunction expressly agreed upon in the *solenâmâ* or asked for in the petition or granted by the decree. In other words, it has been asked, were the plaintiffs decree-holders then consenting to have a decree which would be a wholly infructuous decree and would not even entitle them to close down the openings in excess of the eight that were to be maintained? The answer to this question is quite simple. The *solenâmâ* reserved to the plaintiffs the right to have those openings closed by the execution of the decree. The parties, therefore, provided by this clause the same effect as a mandatory injunction could otherwise have.

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If intention is to be judged from the words of the *solenâmâ*, such intention, in my judgment, is apparent from the fact that whereas, in the case of the openings that were in existence then in excess of the eight, it was provided that they would be closed down, if need be, by the execution of the decree, nothing of that description was said with regard to the stipulation that the defendants would not be competent, save and except the eight boat-passages, to open any other or draw water by any other means in future.

While I am not prepared to affirm all that has been said by the learned District Judge in his judgment, I agree in the view which he has ultimately taken, namely, that the decree cannot be read as containing an injunction and that it should be treated as a decree embodying a contract between the parties and, in that way, is only a declaratory decree.

The result is that, in my opinion, the appeal cannot succeed.

It is, accordingly, dismissed. But, in view of the circumstances of the case, I am not willing to make any order for costs.

The cross-objection is not pressed. It is, accordingly, dismissed, but without any order for costs.

GHOSE J. I agree.

*Appeal dismissed.*

S. M.