1879

THAMMA SINGH v. GANGA RA

hypothecated. The argument for elasticity in construction of the terms of a decree urged by the respondent would, if admitted, be productive of the greatest confusion and inconvenience, and involve a continued conflict of decisions. We must take the decrees as we find them, and not embark into speculation as to what was the intention of the Court passing the decree. Under these circumstances we decree the appeal and plaintiff's claim with costs.

Appeal allowed.

Before Mr. Justice Spankie and Mr. Justice Straight.

1879
July 8.

HARSUKH (DEFENDANT) *v.* MEGHRAJ (PLAINTIFF) *

Decree—What it is to contain—Act VIII of 1859 *(Civil Procedure Code), s.* 189*—Act X of* 1877 *(Civil Procedure Code,) s.* 206.

Where the plaintiff by his claim sought for a decree for money and enforcement of lien on the property hypothecated in the bond on which the claim was based, and he obtained a decree for the "claim as brought" without any specification in it as to the relief he sought by charging the property hypothecated, *held* that such a decree was a decree for money only, and did not enforce the charge on the property.

Muluk Fuqueer Bakhsh v. *Manohur Das* (1) followed.

This was an appeal from the decision of the Judge of Meerut reversing the decree of the Subordinate Judge of the district. The facts of the case and the grounds of contention before the High Court appear sufficiently from the following judgments of the Court.

Babu *Jogindro Nath Chaudhri*, for the appellant.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*) and Babu *Oprokash Chandar Mukarji*, for the respondent.

The following judgments were delivered by the Court:—

SPANKIE, J.—In this case the facts were admitted. The only question for decision is, whether the original decree obtained by appellant charged the property in suit for the satisfaction of the amount decreed.

The Subordinate Judge held that the property was so charged. The suit was one to enforce a lien. The judgment declared the

* Second Appeal, No. 146 of 1879, from a decree of R. M. King, Esq., Officiating Judge of Meerut, dated the 12th November, 1878, reversing a decree of Babu Kashi Nath Biswas, Subordinate Judge of Meerut, dated the 11th July, 1878.

(1) H. C. R., N.-W. P., 1870, p. 29.

1879

HARSUKH v. MEGHRAJ.

lien good and valid. The claim was decreed as brought. The Subordinate Judge allows that the decree was not properly prepared, but there can be no question as to what was granted by the decree. It was not a part but the whole of the claim which was decreed, and this included the enforcement of the lien against the property. The Subordinate Judge did not consider the precedent *Muluk Fuqueer Bakhsh* v. *Lala Manohur Das* (1), which was brought to his notice, to be applicable to the case. In appeal the Judge held that the words "decreed virtually" do not amount to a specific decree that the plaintiff may recover the amount of his claim by the sale of the property hypothecated. He therefore decreed the appeal and reversed the decision of the Subordinate Judge.

The defendant, appellant, relies upon the decision of the first Court.

The wording of the sections bearing upon decrees is the same both in Act VIII of 1859, and Act X of 1877, as regards the points which relate to the case before us. The particulars of the claim are stated in the body of the decree, the subject of dispute, but "the relief granted" is not specified clearly. The claim is "decreed virtually" is not a clear specification of the relief granted. In this respect I have no hesitation in agreeing with the Judge. The Subordinate Judge does not consider that the case cited (1) is applicable to the present case. But in that case the plaintiff in a former suit had not confined himself to asking for relief in the shape of what is called a mere money-decree, he sought also to enforce his charge against the land. The decree, which was passed *ex parte*, after reciting the substance of his plaint, was clearly confined to giving him a decree for the money against the person. The Court (Morgan, C. J. and Ross, J.) held that they were bound to give effect to the decree according to the plain meaning of the language used, and this clearly gave relief merely against the person for the debt. The Court added: "If the plaintiff, from negligence or other cause, omitted to prefer the portion of his claim which sought to charge the land, or, having preferred it, was content to accept an imperfect adjudication, or one which awarded him only a part of the relief claimed, he cannot now bring forward

(1) H. C. R., N.-W. P., 1870, p. 29.

in a fresh suit matter which might well have been disposed of. The decree made was not questioned either in appeal or by review."

The principle upon which the ruling proceeds appears to be very applicable to this case, and to the decree in which the particulars of the claim are stated, and the suit was one in which the plaintiff certainly desired to enforce his lien against the hypothecated property, but the decree is silent in respect to this particular relief. It states that the claim is virtually decreed against the defendant. There is no addition of the words by sale of the property hypothecated in the bond. The decree therefore was imperfect and did not give the relief asked for, and the plaintiff should have got it amended, or have applied for a review, or should have appealed against the decree in order to have it brought into agreement with the judgment.

A majority of the Court in Regular Appeal, No. 75 of 1873, decided by the Full Bench on 30th June, 1876 (1), held upon a reference to the Court at large that, in a case decided in accordance with a confession of judgment, in which the following words appear, "The whole of the property as entered in the deed will remain hypothecated and mortgaged till payment of the entire demand," but in which the operative part of the decree was one "for the amount claimed with costs and interest against the defendants, who have promised to pay the amount within two years, on their confession of judgment admitted by the plaintiff," the decree was merely a money-decree. One of the learned Judges who formed the majority observed: "It seems to me impossible to hold that it is more than a mere money-decree: the relief granted is money only, nor is it provided that the money may be realised by the sale of any particular property, by reason of its hypothecation for the purpose. No doubt it appears that the decree was passed in accordance with a confession of judgment, and does not include all the purport thereof. There is reason to believe that it was imperfectly drawn out, and that its imperfection is detrimental to the decree-holder. It was competent to him to have applied for its correction, but it is not competent to us to rule that it is other than a mere money-decree, in the terms in which it has been drawn."

(1) Unreported.

1879

ARSUKH v. KGHRAJ.

We are, I think, bound to follow the opinion of the majority of the Full Bench in 1876 (1). A judgment, however, of a Division Bench of this Court in *Azim-ul-lah Khan* v. *Kishen Lal* (2) was shown to us in which the learned Judges took a different view, and one of them seems to have changed his opinion. In that case, according to the memorandum of appeal, the decree in words was to the effect that "the claim be decreed with costs and interest," and the Subordinate Judge held that in the decree there was no order respecting the enforcement of the lien, nor is there an order that the money would be realised by an auction-sale of the proprety. There was no order in the decree referring even in the most distant manner to the hypothecated property. The Subordinate Judge admitted that this might have been carelessness in preparing the decree, but considered that the decree-holder should have had it amended. In appeal the learned Judges held that the first Court "had rightly construed the decree to be not merely a money-decree, but a decree also for the enforcement of the lien, and the claim was for the recovery of the bond-debt, by the enforcement of the lien."

This decision is quite opposed to the opinion of the majority of the Court in 1876 (1) and it may have been that the Subordinate Judge misapprehended what the decree did recite. The Munsif, however, admitted in his judgment that the word "*kifalat*" (pledge) had been omitted in the decretal order owing to an error on the part of the decree clerk. The former decisions refer to the time when Act VIII of 1859 was in force, but under the current Act, X of 1877, the wording of s. 206 is still more stringent; now it says that the "decree must agree with the judgment," words not found in the corresponding section of Act VIII of 1859, and the section further provides means for the amendment of a decree, if it is found to be at variance with the judgment, so as to bring it into conformity with the judgment. Appeals also are admissible under the new Act not only from decisions but from any part of them, so that every facility is offered for the correction of decrees. This being so, I think that we should not in any way show tenderness to any indifference on the part of a decree-holder, who consents to take a decree loosely drawn out, or which grants him incomplete relief, and in doing so is

(1) R. A. No. 75 of 1873, decided on the 30th June 1876—unreported.
(2) S. A. No. 155 of 1877, decided on the 19th December, 1878—unreported.

1879

HARSUH v. MEGHR.

not in accordance with the judgment. It is not for us to construe the relief granted by the decree, by reference to the particulars of the claim. These are required to be set forth in the decree, but it is also obligatory to set out clearly the relief granted or other determination of the suit. The decree which gave rise to the present suit does not fulfil these conditions, and as it is expressed, it is in my opinion nothing more than a money-decree against the defendant. I would therefore dismiss the appeal and affirm the judgment with costs.

STRAIGHT, J.—I entirely agree in the views of Mr. Justice Spankie, which are in accordance with the opinion I entertained in a case of a similar kind (1), involving like considerations, before Mr. Justice Oldfield and myself.

Appeal dismissed.

APPELLATE CRIMINAL.

1879
August

Before Mr Justice Straight.

EMPRESS OF INDIA *v.* BANNI.

Exposure of child—Culpable homicide—Act XLV of 1860 *(Indian Penal Code), ss.* 304, 317,

Where a mother abandoned her child, with the intention of wholly abandoning it, and knowing that such abandonment was likely to cause its death, and the child died in consequence of the abandonment, *held* that she could not be convicted and punished under s. 304 and also under s. 317 of the Indian Penal Code, but under s. 304 only.

ONE Banni exposed her infant child, which was in her sole care, in a certain place, with the intention of wholly abandoning it, and knowing that her act was likely to cause its death. The child died in consequence of the exposure. Banni was convicted by Mr. W. Tyrrell, Sessions Judge of Bareilly, on the 18th June, 1879, of an offence punishable under s. 317 of the Indian Penal Code, and also of an offence punishable under s. 304 of that Code, and was sentenced for the first mentioned offence to rigorous imprisonment for two years, and for the last mentioned offence to rigorous im-

(1) *Thamman Singh* v. *Ganga Ram, ante* p. 342.