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Before Mr. Justice Niamat-ullah and Mr. Justice Bennet

HARAKH NARAIN SINGH AND ANOTHER (DEFENDANTS) *v.* BABBAN AND OTHERS (PLAINTIFFS)*

Civil Procedure Code, section 98(2)—*Difference of opinion among members composing a Bench—Decree to be varied so far as the members composing the Bench agree to vary it and confirmed as regards the rest—"Decree".*

In cases where the two Judges composing a Bench hearing an appeal are not unanimous, the decree appealed from should be varied to that extent to which the members composing the Bench agree that it should be varied and the rest of the decree should be confirmed.

Where the decree appealed from is the result of adjudications regarding several items, each adjudication is to be deemed a "decree" for the purpose of section 98(2) of the Civil Procedure Code and the provisions of that section should be applied with reference to the adjudication of each item.

THIS appeal arose out of a suit to enforce a hypothecation bond against the sons of the original executant. The principal sum secured was Rs.4,999, out of which an item of Rs.723-12-0 had admittedly not been paid; so that the actual amount advanced was Rs.4,275-4-0. The question was how much of this sum was recoverable as being justified by legal necessity or antecedent debt. The court of first instance found that except for Rs.357 the whole of the amount was for legal necessity or antecedent debts, and, being of opinion that the Rs.357 was comparatively an insignificant amount, it decreed the suit for Rs.4,275-4-0 and interest. The defendants filed an appeal to the High Court, which was heard by a Bench of two Judges. One of the Judges came to the conclusion that out of the principal, Rs.2,275-4-0 was supported by legal necessity or antecedent debt, and the other Judge came to the conclusion that the whole of the principal except Rs.340 was

*First Appeal No. 183 of 1930, from a decree of Ali Muhammad, Additional Subordinate Judge of Gorakhpur, dated the 23rd of December, 1929.

so supported. The question then arose as to what, in these circumstances, should be the decision in the appeal.

Mr. *Ram Nama Prasad*, for the appellants.

Sir *Tej Bahadur Sapru* and Mr. *Mukhtar Ahmad*, for the respondents.

NIAMAT-ULLAH and BENNET, JJ. :—The two Judges composing the Bench have arrived at different conclusions as regards the amount for which a decree should be passed in favour of the plaintiffs. The lower court decreed the plaintiffs' claim in its entirety. One of us would decree it only to the extent of Rs.2,275-4-0; while the other would uphold the lower court's decree except as regards Rs.340. The question is whether the decree appealed from should be varied so far as the Judges composing the Bench agree that it should be varied and the appeal dismissed as regards the rest, or whether the appeal should be dismissed *in toto*.

Section 98 of the Civil Procedure Code is so worded as to make it arguable that unless the majority of the Judges composing a Bench agree in varying or reversing the decree appealed from, it should be maintained. An opinion to this effect was expressed in *Punjab Akhbarat and Press Co.* v. *Ogilvie* (1). On the other hand, it was definitely held in *Rajagopala Naidu* v. *Subbammal* (2), that the decree appealed from should, in such a case, be varied in so far as the Judges composing the Bench agree to vary it and should be confirmed as regards the rest. It seems to us that this view is more in accord with justice and common sense and should be adopted if the language of the section makes it permissible to do so. We are of opinion that section 98(1) and (2) can be so interpreted as to support the view taken by the Madras High Court. The learned Judges have given their reasons for adopting the same, and we do not consider it necessary to repeat them. We would, however, add some of our own.

(1) (1925) I.L.R., 7 Lah., 179. (2) (1927) I.L.R., 51 Mad., 291.

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Section 98(2) provides: "Where there is no such majority which concurs in a judgment varying or reversing the decree appealed from, such decree shall be confirmed." The word "decree" is defined in section 2(2) to mean "the formal expression of an adjudication which . . . conclusively determines the rights of the parties with regard to all or any of the matters in controversy in suit . . ." The word "judgment" is defined in section 2(9) as "the statement given by the Judge of the grounds of a decree or order."

It seems to us that the word "decree" occurring in section 98(2) of the Civil Procedure Code does not mean the document described by that name, but "the formal expression of an adjudication" as regards "all or any of the matters in controversy in suit". If there are several matters in controversy in a suit, the formal expression of adjudication as regards each of those matters is a "decree" so that, in that sense, adjudication as regards every item in dispute between the parties is a decree. Where the Judges composing a Bench do not agree in confirming the adjudication made by the lower court in respect of one item, such decree or adjudication relating to that item shall be confirmed. At the same time, if they agree in reversing the decree or adjudication by the lower court as regards another item in dispute, the decree in respect of such item shall be varied. In this view, where the document described as the "decree" contains adjudications regarding several items, each adjudication is a decree as defined in section 2(2), and the provisions of section 98 of the Civil Procedure Code should be applied with reference to the adjudication of each item.

In *Krishen Doyal Gir* v. *Irshad Ali Khan* (1) the same view seems to have been taken, though there is no discussion of the reasons on which it proceeds.

(1) (1915) 31 Indian Cases, 965.

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For the reasons stated above we allow the appeal so far as to modify the decree appealed from by reducing the plaintiffs' claim to the extent of Rs.340, besides interest and compound interest. The parties shall receive and pay costs in proportion to success and failure.

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice Rachhpal Singh

DWARKA DAS (DEFENDANT) *v.* KISHAN DAS (PLAINTIFF)*

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Hindu law—Father's debts—Suretyship debt—Father standing security for payment of money—Son's liability not dependent on whether the father had received consideration for standing security.

Under the Mitakshara law the liability of a son for the payment of a debt incurred by the father by way of standing surety for the payment of a sum of money is independent of whether any consideration had been received by the father.

According to the texts of the Mitakshara the liability of the surety himself exists, for the payment of the debt incurred by becoming surety, where the surety is for appearance, for confidence or for payment; the liability of the son exists in the case of surety for payment. But if the surety for appearance or for confidence had bound himself after taking some property in pledge, then his sons also must pay the suretyship debt, from the property taken in pledge. The case of the grandson is different, and apparently there is no liability on him in any case.

Sir *Tej Bahadur Sapru*, Mr. *Hari Ram Jha* and Miss *S. K. Nehru*, for the appellant.

Dr. *K. N. Katju* and Mr. *M. N. Kaul*, for the respondent.

SULAIMAN, C. J., and RACHHPAL SINGH, J.:—This is a defendant's appeal arising out of a suit for recovery of about Rs.12,000 with interest on the basis of a security bond dated the 24th of June, 1922, executed by the

*First Appeal No. 463 of 1929, from a decree of J. N. Kaul, Additional Subordinate Judge of Benares, dated the 19th of July, 1929.