1881
January 3.

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

DEBI CHARAN (PLAINTIFF) *v.* PIRBHU DIN RAM (DEFENDANT).*

Decree enforcing Hypothecation—Money-decree.

The obligee of a bond for the payment of money, in which immoveable property was hypothecated as collateral security, sued the obligor upon such bond claiming to recover the moneys due thereunder from the obligor personally and by the sale of the hypothecated property. He obtained a decree in such suit in these terms :—"That the claim of the plaintiff, with costs of the suit and future interest at eight annas per cent. per mensem, be decreed."

Held by the majority of the Full Bench that such decree was not merely a money-decree, but was also one for the enforcement of a lien.

Janki Prasad v. *Baldeo Narain* (1) distinguished by STUART, C.J.

Per SPANKIE, J., and STRAIGHT, J.—That such decree was a mere money-decree. *Muluq Fuqeer Buksh* v. *Lala Manohur Doss* (2) and *Thamman Singh* v. *Ganga Ram* (3) followed.

THE plaintiff in this suit claimed to establish his right to bring a six-pie share of a certain village to sale in execution of a decree held by him against one Dhundhai, dated the 21st March, 1878. Dhundhai had on the 9th December, 1873, given the plaintiff a bond for the payment of certain moneys in which he hypothecated such share as collateral security for such payment. The plaintiff brought a suit against Dhundhai on this bond in which he claimed to recover the moneys due thereunder from the obligor personally and by the sale of such share. He obtained a decree in that suit, dated the 21st March, 1878, in these terms: "The claim of the plaintiff, with costs of the suit and future interest at eight annas per cent. per mensem, be decreed." In execution of this decree he caused such share to be attached and advertised for sale. The defendant in the present suit, who was in possession of such share under a deed of sale of a date subsequent to the date of the plaintiff's bond, objected to the attach-

* Second Appeal, No. 328 of 1880, from a decree of Hakim Rahat Ali, Subordinate Judge of Gorakhpur, dated the 8th January, 1880, reversing a decree of Maulvi Muhammad Kamil, Munsif of Basti, dated the 16th September, 1879.

(1) I. L. R., 3 All., 216. (2) N.-W. P., H. C. Rep., 1870, p. 29.
(3) I. L. R., 2 All., 345.

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ment and sale, and his objection was allowed. The plaintiff in consequence brought the present suit against him to establish his right under the decree to bring such share to sale. On appeal by the defendant from the decree of the Court of first instance in the plaintiff's favour, it was contended by him that the plaintiff's decree of the 21st March, 1878, was a mere money-decree, and did not enforce the hypothecation of such share, and the plaintiff was not entitled to bring such share to sale, it having passed to him, the defendant; and that the plaintiff's claim in the present suit to enforce the hypothecation of such share was barred by the provisions of s. 13 of Act X of 1877, as he had claimed in the former suit to have such hypothecation enforced, but such relief had not been granted to him by the decree in that suit. The lower appellate Court allowed the defendant's contention that the plaintiff's decree of the 21st March, 1878, was a mere money-decree and not one enforcing the hypothecation of such share; and dismissed the plaintiff's suit.

The plaintiff appealed to the High Court contending that that decree was not a mere money-decree but one enforcing the hypothecation of such share. The appeal came for hearing before STUART, C.J., and STRAIGHT, J., who referred to the Full Bench the question whether that decree amounted to one for enforcement of lien or not.

Mr. *Niblett*, for the appellant.

The *Senior Government Pleader* (Lala *Juala Prasad*) and *Hanuman Prasad*, for the respondent.

The following judgments were delivered by the Full Bench :—

PEARSON, J.—In reply to the question referred to the Full Bench I should say that, when a claim is decreed without reservation, whatever is included in the claim is included in the decree. In the case before us the claim was to recover Rs. 49, principal, and Rs. 34-13-9, interest, under a bond dated 9th December, 1873, by sale of the property hypothecated in the bond. The claim was decreed, not a part of the claim but the whole claim. The decree contains the particulars of the claim, but, in ordering that the claim of the plaintiff be decreed with costs and interest

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at eight annas per cent. per mensem, it may be that it does not "specify the relief granted" in the manner intended by s. 206 of the Civil Procedure Code. Notwithstanding the defect of specification, I am, however, of opinion that the decree is one for the enforcement of a lien and not merely a money-decree. Indeed if, in consequence of that defect, it could not be regarded as a decree for the enforcement of a lien, it could not for the same reason be regarded as a money-decree. But the decree cannot be treated as a nullity nor can execution of it be reasonably refused merely on account of such a defect. There can be no doubt as to what relief was really granted by the decree because it is the same as what was claimed, and is specifically stated in the plaint and in the heading of the decree. No difficulty is caused in the execution of the decree by reason of any doubt of that sort. To deprive the decree-holder of the benefit of his decree on the ground of the defect noticed would be to administer the law so as to defeat the ends of justice. For that defect the Judge and ministerial officers of the lower Court and the pleaders of the parties in that Court are responsible. The last clause of s. 206 provides that, "if the decree is found to be at variance with the judgment, or if any clerical or arithmetical error be found in the decree, the Court shall of its own motion or on that of any of the parties amend the decree so as to bring it into conformity with the judgment or to correct such error." In the present instance the decree is not at variance with the judgment, and the defect of specification is hardly a clerical or arithmetical error; but I cannot conceive that the Court would be incompetent to supply the defect, if it were absolutely impossible for the decree to be executed without amendment. But I have already intimated that in my judgment the decree framed is clearly and unambiguously in terms as well as in intention one both for money and enforcement of lien, and should be executed as such.

OLDFIELD, J.—I entirely concur in the view taken by Mr. Justice Pearson.

STUART, C.J.—The answer of Mr. Justice Pearson in this reference and concurred in by Mr. Justice Oldfield so clearly expresses the view I myself take of the question submitted to us that

it seems unnecessary for me to say more. I may observe, however, that this opinion is in entire accordance with my understanding of the rulings of this Court which were relied on at the hearing. Much stress was laid on a decision of a majority of the Full Bench of this Court in the case of *Janki Prasad* v. *Baldeo Narain* (1), and it was argued that on the principle there applied the decree in the present case does not cover the hypothecated property, but is a mere money-decree. That case, however, was entirely a different one from the present. There the claim no doubt recited the hypothecation in the bond, but the decree itself was notwithstanding expressly limited in its terms to the money sued for, and, with remarkable particularity, all the details and items of the money claim being set out together with a precise statement of the costs. Here the decree, after distinctly setting out the claim to recover "by sale of the said hypothecated (six English pies) share," being the property expressly hypothecated in the bond, ends thus: "It is decreed and ordered that the claim of the plaintiff be decreed with costs and interest at 8 annas." Words which I hold give recovery against the hypothecated property.

STRAIGHT, J., (SPANKIE, J., concurring).—In reply to this reference we would say that, in our opinion, the words "the claim of the plaintiff with costs of the suit and future interest at 8 annas per cent. per mensem be decreed" do not amount to a decree for enforcement of lien. It is true that in the plaint relief was sought against the defendant personally and against the property pledged, and no doubt the claim under both heads is recapitulated at the commencement of the decree. But so far as the effective words of the decretal order are concerned, they, in our judgment, at best amount to nothing more than a decree for money. As regards the claim for enforcement of lien, there is no "clear specification" that relief is granted in respect thereof as required by s. 206 of the Civil Procedure Code: and it seems to us that, had the question of *res judicata* arisen in the case, we should have been bound to hold, in accordance with the provision contained in Explanation 3 of s. 13, that the relief as to enforcement of lien claimed in the plaint, not being expressly granted by the decree, must be deemed to have been

(1) I. L. R., 3 All., 216.

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refused. In holding this view, we are only following an authority —*Muluq Fuqeer Buksh* v. *Lala Manohur Doss* (1)—which we both had occasion to consider in reference to a decision given by us in *Harsukh* v. *Meghraj* (2). There is also another case—*Thamman Singh* v. *Ganga Ram* (3)—; and we have heard nothing in argument on this reference to lead us to doubt the accuracy of the judgments therein delivered, with the opinions expressed in which we may say we entirely concur. Under these circumstances our reply to this reference is as already indicated.

CRIMINAL JURISDICTION.

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January 12.

Before Mr. Justice Straight.

IN THE MATTER OF THE PETITION OF SAT NARAIN SINGH AND ANOTHER.

Warrant case—Refusal of Magistrate to summon witness named by accused—Error or defect in proceedings—Act X of 1872 (*Criminal Procedure Code*), *ss.* 283, 362.

Where the Magistrate trying an offence rejected an application by the accused person that a certain person might be examined on his behalf either in court or by commission, without recording his reasons for refusing to summon such person, as required by s. 362 of the Criminal Procedure Code, *held* that the conviction of the accused person must be set aside, and the case be re-opened by such Magistrate, and the application by the accused for the examination of such person be disposed of according to law.

THIS was an application to the High Court for the exercise of its powers of revision under s. 297 of Act X of 1872. The petitioners, Sat Narain Singh and Ram Alam Singh, were convicted on the 9th October, 1880, in a trial before Babu Harnam Chandar Seth, exercising the powers of a Magistrate of the first class in the Mirzapur district, of rioting and causing hurt. They appealed to the Sessions Judge of Mirzapur, Mr. S. Moons, who on the 11th November, 1880, affirmed the convictions. It appeared that the riot had taken place at a village called Dharmurpur in which the petitioners resided. The defence of the petitioners was that they had not taken any part in the riot, not having been in that village on the day on which the riot occurred, but having been on that day at Chunar; and they applied to the Magistrate that a lady

(1) N.-W. P., H. C. Rep., 1870, p 29.
(2) I. L. R., 2 All., 345.
(3) I. L. R., 2 All., 342.