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June 30.

## FULL BENCH.

*Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner,  
Mr. Justice Sparkie, and Mr. Justice Oulfield.*

**JANKI PRASAD (PLAINTIFF) v. BALDEO NARAIN AND OTHERS (DEFENDANTS).\***

*Money-decree—Decree enforcing Hypothecation—Mortgage.*

A suit on a bond in which immoveable property was hypothecated was adjusted by the defendant agreeing to pay the amount claimed and costs, with interest, by instalments within a fixed time, and that, in the event of default, the plaintiff should be at liberty to bring such property to sale. The Court made a decree ordering the defendant to pay the plaintiff the amount claimed and costs, with interest, "in accordance with" such agreement. *Held* (TURNER, J., and OLDFIELD, J., dissenting) that such decree was a mere money-decree, and not one which gave the plaintiff a lien on such property.

THE plaintiff in this suit claimed the moneys due on a bond dated the 18th December, 1867, "by establishment and enforcement of his right as mortgagee in respect of the property pledged and mortgaged in the bond." He claimed to recover such moneys from the obligors of the bond, one Ghulam Ismail and his two sons, personally, and by the auction-sale of the property hypothecated in the bond. He joined as defendants in the suit Baldeo Narain, Jagat Narain, and Bishen Narain, persons who had, on the 20th July, 1871, purchased a portion of such property at a sale in the execution of a decree against Ghulam Ismail and his sons, dated the 5th March, 1866; and Abdul Ghanni, the person to whom Ghulam Ismail and his sons had transferred by sale another portion of such property, under an instrument bearing date the 20th June, 1870. He alleged that the decree dated the 5th March, 1866, was a mere money-decree. The auction-purchasers had obtained that decree in the Court of the Principal Sadr Amin of Allahabad in a suit on two bonds for the payment of money dated, respectively, the 17th January, 1860, and the 14th September, 1860, executed in their favor by Ghulam Ismail and his sons, in which the property in respect of which they were sued had been hypothecated to them. In that suit Ghulam Ismail and his sons filed a confession of judgment, the material part of which was as follows:—

\* Regular Appeal, No. 75 of 1873, from a decree of T. W. Rawlins, Esq., Subordinate Judge of Allahabad, dated the 6th June, 1873. Reported under the special orders of the Chief Justice.

" We (the defendants) \* \* \* \* do declare that, whereas a regular suit filed by plaintiffs, claiming Rs. 5,589-6-6, under two deeds dated 17th January, 1860, and 14th September, 1860, respectively, in which all our zamindari, as detailed therein, is mortgaged, is pending against us (defendants) in the Principal Sadr Amin's Court, and whereas the claim of the plaintiffs is in all respects right and proper, we have, considering its justice, willingly and voluntarily executed this confession of judgment covenanting to pay, without objection, in two years the aggregate amount of their claims with costs and interest, to the extent as may be specified in the decision. The interest on the amount decreed until liquidation thereof shall be paid by us half-yearly to the plaintiffs at the rate of one per cent. per mensem, and we shall have the payment endorsed on the decree, and a petition informing the Court of the fact will be presented. We (the judgment-debtors) shall not claim a deduction of any payments made in part or whole, unless endorsed on the decree and communicated to the Court by petition. We shall not claim a deduction of the stipulated interest paid by us in the principal amount of the decree, and should we do so, it shall be false and illegal. The whole of the property as entered in the deed shall remain hypothecated and mortgaged till payment of the entire demand. If a regular suit is brought against us, jointly or severally, by any creditors within the above stipulated period, or if an application for execution of decree is presented in Court by any decree-holder, or if a part or the whole of the mortgaged property belonging to us is farmed out or put up for auction-sale in default of payment of arrears of revenue, or if we (judgment-debtors) fail to pay interest mentioned above, or if the decree-holders find any obstacle, great or small, in the recovery of the decretal amount, they shall have the power at all times to duly realize, in a lump sum, the principal and interest due under the decree from us and from our zamindari property mortgaged and hypothecated in the deeds on which the claim is based, without waiting for the expiry of the fixed period, and in cancelment thereof, we (judgment-debtors) shall never have any objection to the annulment of the agreement. We have written this confession of judgment containing the foregoing conditions to stand as evidence. The correctness of the above facts can be ascertained from the pleader for the plaintiffs."

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The Principal Sadr Amin gave the auction-purchasers a decree on the 5th March, 1866, which, after setting forth the particulars of their claim, and reciting that the case had been brought forward on that date for hearing and discussion in the presence of the pleaders for the parties, and that defendants had confessed judgment, proceeded in these terms :—“ According to the confession of judgment, it was ordered that a decree for Rs. 5,589-6-6, the amount claimed, the costs and interest for the time the suit was pending, and on all the items to the date of realization, be passed in favor of the plaintiffs against the defendants, who have promised to pay the amount due to the plaintiffs within two years in their confession of judgment admitted by the plaintiffs.”

In the present suit the auction-purchasers set up as a defence that the decree of the 5th March, 1866, under which they had purchased, was not a mere money-decree, but one which enforced an hypothecation of the property purchased by them of an earlier date than the date of the hypothecation which the plaintiff sought to enforce, and consequently that property was not liable to the hypothecation which the plaintiff sought to enforce. Upon the issue,—Is the decree of 1866 to be considered as a decree against the mortgaged property?—the Court of first instance held that that decree should be so considered, its decision upon this issue being as follows :—“ I have no hesitation in finding for the defendant. The decree was given without any inquiry into the merits of the case on the defendant’s full confession of judgment, and was evidently intended to be in strict accordance with it. The decree-holder, if he discovered the omission, should have applied to the Court to have it repaired; but if he failed to do this, possibly from ignorance of the terms in which the decree was couched, or misapprehension of the full meaning of the omission, it would be obviously inequitable to punish him by stereotyping a clerical error of the decree-writer”.

The plaintiff appealed to the High Court, contending that the decree of the 5th March, 1866, had been misconstrued by the Court of first instance, and that it was merely a decree for the payment of money. The Division Bench before which the appeal came for hearing (PEARSON, J., and TURNER, J.,) referred to the Full Bench

the question whether that decree was a mere money-decree or not.

Munshi *Hanuman Prasad* and Pandit *Bishambhar Nath*, for the appellant.

The *Junior Government Pleader* (*Babu Dwarka Nath Banarji*), *Babu Beni Prasad*, *Munshi Sukh Ram*, and *Mir Akbar Husain*, for the respondents.

The following judgments were delivered by the Full Bench :—

STUART, C. J.—The question referred in this case is whether the decree under which the property was sold was a mere money-decree, or whether it was a decree which could also be enforced against the property hypothecated in the bond. The facts and procedure which raised this question are somewhat peculiar, and there may possibly have been some mistake in preparing the decree in the terms in which it is drawn up. But taking it as it stands, I am clearly of opinion that it was a mere money-decree and nothing more. It was a decree passed on a confession of judgment. (The learned Chief Justice, after setting out the decree and the confession of judgment as set out above, continued:) Such being the confession of judgment, it appears to me difficult to resist the conclusion that it was the intention of the parties to give the plaintiffs recovery against the property, as well as against the persons of their debtors, and that, if the decretal order stopped short at the money, and did not in its terms cover recourse against the property, that was simply a mistake on the part of the officer who drew it up. And such, I say again, was, I think, the probable intention. But we cannot construe a decree by means of supposed intentions, or presumptions, or inferences. We must look, and we must look alone, to the decreeing and operative words in which it is expressed, and so reading this decree I cannot extend its terms so as to make it enforceable against the hypothecated property in respect of the lien in the bonds, but must regard it as a mere money-decree. And as I suggested at the hearing, and notwithstanding any reasonable belief to the contrary, from the peculiar terms of the confession of judgment, the decree, by stopping short at the order for payment of the money only, may possibly have given effect to some under-

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standing or intermediate arrangement among the parties. Such an understanding or arrangement may not have been likely, but it is a possible contingency, and it is not at least violently opposed to the terms of the defendant's confession. But be that as it may, there is the decree itself in the terms in which it was allowed to go out, and for the purpose of the present reference it is immaterial whether it was drawn up in these terms by mistake or not. Nor can it be said that, so far as it goes, it is not according to the confession of judgment, although it might have gone further according to the spirit and possible intention of that confession.

PEARSON, J.—We are asked whether the decree of the Court of the Subordinate Judge of Allahabad, dated 5th March, 1866, in the original suit No. 98 of 1866 is a mortgage decree or a mere money-decree. The decree orders the payment to the plaintiffs of Rs. 5,589-6-6, the amount claimed, with costs and interest for the period during which the suit was pending and to the date of realization, by the defendants within two years, the period specified in the confession of judgment accepted by the plaintiffs. Having regard to the terms of the decree, 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 realized 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 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.

TURNER, J. (OLDFIELD, J., concurring)—There can be no doubt that the Court intended to pronounce a decree in the terms of the confession of judgment, and that the confession contained a stipulation that, in the event of default in the payment of the instalments, the decree-holder should be at liberty forthwith to bring the property to sale. The intention of the Court then was that the decree should embody the relief. The operative part of the

decree runs as follows :—“In accordance with the confession of judgment filed by the defendants, it is ordered that a decree for Rs. 5,589-6-6, the amount of the claim, the costs, and interest pending the suit, and on the whole amount up to the date of realization, within the two years mentioned in the confession of judgment accepted by the plaintiffs, be passed in favor of the plaintiffs against the defendants.” This decree is no doubt most inartificially prepared, but it contains in the judgment language sufficient to import, not a part only, but the whole of the terms of the confession ; and it being manifestly the intention of the Court and the parties that the whole of the terms should be incorporated in the decree, we consider ourselves warranted in pronouncing that the decree is not a mere money-decree, and that the sale effected under it was made in exercise of the power of sale for the enforcement of the security.

SPANKIE, J.—We are asked whether the decree is merely a money-decree, or whether it includes all the terms of the compromise, and so declares the decree-holder’s lien on the property hypothecated in the bonds on which the plaintiffs sued and the defendants filed a confession of judgment. It appears to me, looking at the terms of the decree, that it is confined to a decree for Rs. 5,589-6-6, the amount claimed, and costs and interest, “in favor of the plaintiffs against the defendants, who promise to pay the amount due to the plaintiffs within two years as specified in their confession of judgment accepted by the plaintiffs.” I think that this is a money-decree, and that the words outside the decree, “and according to the confession of judgment filed by the defendants, it was ordered,” cannot be said to extend all the terms of the confession of judgment to the decree itself.

## APPELLATE CIVIL.

*Before Mr. Justice Pearson and Mr. Justice Oldfield.*

DURGA PRASAD (PLAINTIFF) *v.* BALDEO AND OTHERS (DEFENDANTS).\*

*Agreement without Consideration—Act IX of 1872 (Contract Act), s. 2 (d) and s. 25 (2).*

The plaintiff sued to establish an agreement in writing by which the defendants promised to pay him a commission on articles sold through their agency in a

\* Second Appeal, No. 1056 of 1879, from a decree of F. E. Elliot, Esq., Judge of Mainpuri, dated the 1st July, 1879, reversing a decree of Mirza Abid Ali Beg, Subordinate Judge of Mainpuri, dated the 10th July, 1878.

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