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April 20.

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

RANJIT SINGH AND OTHERS (DEFENDANTS) *v.* ILAHI BAKHSH (PLAINTIFF)*.

Partition of mahal—Act XIX of 1873 *(N.-W. P. Land-Revenue Act), ss.* 113, 114, 115—*Omission to frame decree in case under s.* 113, *in which a question of title is decided—Necessity for a decree in such case—Necessity for a decree in a suit under the Civil Procedure Code—Second appeal.*

When a Collector or Assistant Collector has determined to inquire into objections raising questions of title preferred under s. 113 of the N.-W. P. Land-Revenue Act, 1873, his proceeding thereupon must be conducted as an original suit in a Civil Court.

It is essential that in a suit under the Civil Procedure Code a decree should be drawn up.

Held, therefore, that in a proceeding under s. 119 of the N.-W. P. Land-Revenue Act, where the rights of the parties are decided, a decree should be drawn up giving effect to the decision.

An Assistant Collector passed a decision under s. 113 declaring the rights of the parties, but did not draw up a decree giving effect to such decision. There was an appeal to the District Court from such decision, which made a decree affirming it.

Held, by STUART, C. J., on second appeal, that the defect arising from the want of a decree on the record of the Court of first instance was a bar to the hearing of the second appeal, and the proceeding of the District Court should be set aside, and the case should be sent back to Assistant Collector in order that he might frame a decree.

Held by STRAIGHT, J., that the decree of the District Court was appealable, such defect notwithstanding, and the appeal should be decreed and the decree of the District Court reversed, and the case be sent back to the Assistant Collector for the purpose aforesaid.

Observations by STUART, C. J., on the absence in the Code of Civil Procedure of any mandatory provisions in reference to the framing of decrees.

THIS was a case instituted in the Court of an Assistant Collector of the first class under the provisions of s. 109 of Act XIX of 1873 (N.-W. P. Land-Revenue Act), for partition of a seven and a half biswas share of a village. Notices were issued according to the provisions of s. 111 under which the defendants appeared and lodged certain objections raising question of title; whereupon the Assistant Collector proceeded under s. 113 of the same Act to inquire into the merits of such objections. After taking evidence on both sides he decided all the issues raised in favour of the plaint-

* Second Appeal No. 676 of 1883, from a decree of H. G. Keene, Esq., Judge of Meerut, dated the 28th February, 1882, affirming a decree of G. Billings, Esq., Assistant Collector of the first class, Meerut, dated the 6th January, 1882.

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iff, whom he declared "under s. 113, Act XIX of 1873, to be entitled to a share in the disputed property proportionate to his purchased seven and a half biswas share in the village." No decree was made by the Assistant Collector in accordance with this decision. From this decision of the Assistant Collector, dated the 6th January, 1882, the defendants appealed to the District Judge, who, after noticing the absence of a decree, dismissed the appeal, being of opinion that "the decision aforesaid was intended to have the force of a decree."

In second appeal to the High Court two questions were raised: —(1) whether there should be a formal decree framed in a case decided under s. 113 of Act XIX of 1873 in which the rights of the parties are declared; and (2) what order should be made by the High Court in this appeal, no formal decree having been framed by the Assistant Collector.

Mr. *Hill*, the *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), and Pandit *Sundar Lal*, for the appellants.

Mr. *Conlan* and Pandit *Bishambhar Nath*, for the respondent.

The Court (STUART, C. J., and STRAIGHT, J.) delivered the following judgments:—

STUART, C. J.—This was a case purporting to be a second appeal in a revenue matter from the Court of the District Judge of Meerut, but when it was called on for hearing before us, Mr. Hill, leading counsel for the appellants, brought to our notice the circumstance that the judgment of the Assistant Collector had not been followed by any decretal order, and that in fact there was no decree by the Court of first instance. This peculiarity of the case, however, does not appear to have escaped the notice of the lower Courts. It is not referred to in the reasons of appeal before the lower appellate Court, but the Judge himself has in his judgment directed attention to it. He says:—"This decision (of the Assistant Collector) is not free from obvious irregularities. There has been no formal decree." He goes on to add, however, "but the absence of such has been condoned by this Court on the lower Court certifying that its decision was intended to have the effect of a decree." The Judge further observes:—"The above abstracts shows that

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there has been a substantial determination of the points duly framed, and the appellants do not object to the technical informality." In consequence of these remarks, I have looked into the record, as I was anxious to know what the "certifying" proceeding of the Court of the Assistant Collector could possibly be. I find that what took place was this. At the end of the memorandum of appeal, filed in the lower appellate Court, and which was signed by Mr. Smith, counsel for the appellants, there is this note by the Judge's Munsarim:—"Properly stamped—within time—decree not filed—see s. 541, Act X of 1877, and ss. 113 and 114, Act XIX of 1873. Mr. Smith says that decrees are not prepared in such cases and granted to parties by the Revenue Courts, nor is there any provision for it."

Upon this the Judge wrote the following:—"Let the Collector be called upon to state whether the paper, of which copy has been herewith filed, is the expression of his opinion adjudicating and forming a decision in the case, or whether there is any other decree." The report so ordered is in the following terms:—"The order in this case was a decision under ss. 113 and 114, Act XIX of 1873, adjudicating the question of title raised in the course of the partition proceedings. There is no other decree, nor does any appear to be required, as the matter forming the subject of the contention has been disposed of, and there is nothing in the Act which provides for the passing of a separate 'decree' in such cases."

This seems to have satisfied the Judge, for he thereupon recorded an order to register the appeal. Now, the question thus raised, that is, whether a formal decree is an absolutely necessary and essential part of the record in a civil suit under the Code of Civil Procedure, is not a little perplexing, although the argument on the score of the convenience afforded by a formal decree is so great as to be conclusive to the mind of a practised lawyer (if not to those who refused to know anything about procedure beyond the letter of the Code itself), in favour of the view that a decree summarizing the conclusions of a judgment, and expressed in the formal language of the law, is a necessary judicial supplement to the provisions of the Code of Procedure. I say advisedly judicial supplement, for, strange as it may seem, there is not to be found in the

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entire Code, with one curious exception which I shall presently notice, a single enactment providing *eo ipso* that a judgment in suits shall be followed by a *decree*, while the mind and intention of the Legislature on the subject are, I think, manifestly discernible. The Munsarim of the Meerut District Court, whose note is very creditable to him, was quite correct in directing attention to ss. 113 and 114 of the Revenue Act. These sections are in the following terms:—"113. If the objection raises any question of title, or of proprietary right, which has not been already determined by a Court of competent jurisdiction, the Collector of the District or Assistant Collector may either decline to grant the application until the question in dispute has been determined by a competent Court, or he may proceed to inquire into the merits of the objection. In the latter case the Collector of the District or Assistant Collector after making the necessary inquiry, and taking such evidence as may be adduced, shall record a proceeding declaring the nature and extent of the interest of the party or parties applying for the partition, and any other party or parties who may be affected thereby. The procedure to be observed by the Collector of the District or Assistant Collector in trying such cases shall be that laid down in the Code of Civil Procedure for the trial of original suits, and he may, with the consent of the parties, refer any question arising in such case to arbitration, and the provisions of Chapter VI (relative to arbitrators) of the same Code shall apply to such reference."

"114. All orders and decisions passed by the Collector of the District or Assistant Collector under the last preceding section, for declaring the rights of parties, shall be held to be decisions of a Court of Civil Judicature of first instance, and shall be open to appeal to the District or High Court under the rules applicable to regular appeals to those Courts. Upon such appeals being made, the District or High Court may issue a precept to the Collector of the District or Assistant Collector, desiring him to stay the partition pending the decision of the appeal."

These sections may be added s. 115, allowing a second appeal to this Court. It is thus quite clear that the entire procedure provided by the Civil Code is made to apply to all partition suits, such

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as the present, and it follows that if the formality of an express decree is necessary to a judicial record in a civil suit, it is equally necessary in a revenue suit.

But let us look into the Code of Civil Procedure, and see how its provision stand in reference to this matter. Chapter XVII of the Code treats "of judgment and decree," and generally, it may be said, of the elementary qualities of a suit; and it begins with s. 198, which provides that "the Court, after the evidence has been duly taken and the parties have been heard, either in person or by their respective pleaders or recognized agents, *shall pronounce judgment* in open Court, either at once, or on some future day, of which due notice shall be given to the parties or their pleaders;" and the following sections, down to s. 204 inclusive, deal with the qualities and characteristics of a judgment. We then come to s. 205, which without any preface or enactment that the judgment shall be followed by a decree, provides that "*the decree* shall bear date the day on which the judgment was pronounced; and when the Judge has satisfied himself that the decree has been drawn up in accordance with the judgment, he shall sign the decree." What "decree?" I cannot find any previous enactment, or, indeed, any provision throughout the Code, that in all suits the judgment shall be followed by a decree while at the same time the definition of "decree," its form and its characteristics, are carefully stated. It really almost looks as if the Legislature meant to say:—"The formality of a decree is not absolutely essential to the enforcement of a judgment, but it *may* be added, and when it is so added, it shall be in the terms and in the form that have been provided in sections so and so." Can that possibly be what was intended? Surely not. Why should there be a difference between a judgment and decree in this respect? The Code provides that there shall be a judgment and a judgment of the kind it describes, and it explains in s. 206 that the decree must agree with the judgment, and what it shall contain and as to costs, but it does not say that there *shall* be a *decree*, or that the judgment shall be followed by a decree or anything to that effect. It appears to assume a decree as part of the procedure in a suit, and so far it may be argued very reasonably that such a formality was intended. That a formal decree was

really intended is also plain from other parts of the Code. Chapter XIX, which begins with s. 223 and ends with s. 343, shows this abundantly. Then the compilers of the Code are at pains to inform us what they mean by a decree, and by a very precise definition we are told that "decree" "means the formal expression of an adjudication upon any right claimed or defence set up in a Civil Court, when such adjudication, so far as regards the Court expressing it, decides the suit or appeal. An order rejecting a plaint, or directing accounts to be taken, or determining any question mentioned or referred to in s. 244, but not specified in s. 588, is within this definition; an order specified in s. 588 is not within this definition." Then s. 541 provides that an appeal from an original decree "shall be accompanied by a copy of the *decree appealed against* and (unless the appellate Court dispenses therewith) of the judgment on which it is founded. Such memorandum shall set forth, concisely and under distinct heads, the grounds of objection to *the decree appealed against*, without an argument or narrative, and such grounds shall be numbered consecutively' and by s. 587 the same procedure is to be followed in appeals from appellate decrees, so that under such procedure no appeal without a decree can be entertained, and many other instances of the same kind could be given showing that a decree as a formal proceeding in itself was intended, although it is not in so many terms required by the Code, as a necessary proceeding after judgment.

A curious exception to this general condition of the Code is to be found in s. 522, which regulates the procedure for the enforcement of awards in arbitrations directed by the Court. By that section it is provided that "if the Court sees no reason to remit the award or any of the matters referred to arbitration for re-consideration in manner aforesaid, and if no application has been made to set aside the award, or if the Court has refused such application, the Court shall * * * proceed to give judgment according to the award," and "*upon the judgment so given a decree shall follow*, and shall be enforced in manner provided by this Code for the execution of decrees. No appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with, the award." This exceptional provision, that in the case

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stated a decree shall follow upon the judgment, however remarkable in itself, appears to me to lend force to the reasoning which the Code otherwise suggests, and which shows that a decree as a necessary formality of a suit was clearly intended, as indeed its existence in practice is plainly assumed. I am therefore fully persuaded that the intention of the Code of Civil Procedure was that in all suits there should not only be a judgment, but a decree giving the formal expression of an adjudication when such adjudication decides a suit or appeal. But at the same time this is an intention we derive rather by implication than by direct expression. And why this should be so it is difficult to understand, unless the want of an express provision that a decree should follow a judgment was an inadvertency, and that in fact such a defect is a *casus omissus* in the Code.

It appears to me, indeed, that it should be so held, and although an express provision would have been more satisfactory, I consider that it is my duty to give effect to the manifest intention of the Code, and therefore to hold, as I do hold, that a decree is a necessary part of the ultimate procedure in all suits, and that the want of it is not, as the Judge of Meerut seems to have imagined, a mere irregularity. It is, on the contrary, an indispensable requisite of a judicial record, nor can the want of it be "condoned" either by the Court or by the parties, and without it, in fact, an appeal cannot be put in motion. The *judgment* clearly is not enough, for that is at best an argumentative explanation of the mind of the Court, and it is not sufficiently tangible for the purposes of an appeal on grounds and for reasons which may be distinctly set out. For such purposes the summing up of the conclusions of the Court by means of a decretal order, and thereon a decree, is in substance as well as in form a necessary reality in litigious procedure, without which the law could not be executed. In fact, as I remarked in the case before us, without a decree a judicial record does not *speak*, and wanting it no proceeding subsequent to the judgment can with any certainty be taken. The decree is, indeed, in substance as well as in form, the mouth-piece of the suit in its immediate result, and without it the dispute between the parties would not be intelligible. The question is one of procedure based on principles which are essential to the legal charac-

ter and the logical completeness of all suits, and this is a judicial *desideratum* which appears to me to be fully recognized by ss. 113 and 114 of Act XIX of 1873, read with the Code, as I have felt bound to expound it in regard to this case.

Under these circumstances there has been some discussion as to what should be the form of our order. It has been suggested that, although the reasons of appeal cannot be looked at, still the case can be entertained by us in the form of the appeal actually presented, for the purpose of enabling us, being thus seized of the case, to make a proper order. But this view I cannot accept. There is, in fact, no appeal before us which we can dispose of in that character, no appeal which we can hear, because the grounds on which the appeal comes into this Court are grounds which we cannot consider as to whether they be good or whether they be bad. The want of a decree in the first Court's record was, when the case was called on before us, brought to our notice by the counsel for the appellants himself as preventing the hearing of the appeal on its merits. To give him our judgment, therefore, by any form of words would, to say the least, be a grossly illogical proceeding on our part. In fact, the actual state of the case in the form of an appeal in this Court shows another *casus omissus* in the Code of Procedure, and these defects are really becoming so numerous as to deserve the attention of the Legislature. There is not, so far as I can discover, a single section of the Code of Procedure which provides for the form of judgment or order in such a case as the present. The whole of the provisions of the Code assume a full and proper appeal before the appellate Court, and that even where, as provided by s. 542, the Court disposes of the appeal on some ground not set forth in the reasons, but still these reasons being before the Court for disposal on the lower Court's decree. Want of jurisdiction in a lower Court is quite a different matter, for a plea to such effect necessarily assumes a proper judgment and decree, without which, in fact, no plea against the jurisdiction could be taken.

Again, the form and contents of the judgment in appeal are given in s. 574, and it is the only provision I can find in the Code on the subject of the judgment in appeal; and it appears to me

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to be intended to apply to all appellate judgments whatever, and no straining of its directions could make the section apply to the present case. Thus, this s. 574 provides that "the judgment of the appellate Court shall state—

(*a*) the points for determination ;

(*b*) the decision thereupon ;

(*c*) the reasons for the decision ; and

(*d*) when the decree appealed against is reversed or varied, the relief to which the appellant is entitled, and shall at the time that it is pronounced be signed by the Judge or by the Judges concurring therein." None of these particulars can be noticed in the case now before us, and we are therefore left to our resources for making such an order as will apply to and regulate the procedure to be followed.

The defect arising from the want of a decree in the first Court's record is fatal, not only to the present appeal on its own merits, but even to its being heard, and also to the appeal to the Judge below, and in fact, to the validity and regularity of everything that has been done since the recording of the Assistant Collector's judgment, and the order I must propose is that we set aside the whole proceeding before the Judge, and direct that the case be sent back to the Assistant Collector, that he may prepare and complete the proceedings before him by the addition of a proper decree, giving precise effect substantially and formally to the conclusions of his judgment. The costs of this order will be costs in the cause.

STRAIGHT, J.—On the 15th March, 1880, the respondent to this appeal made an application to the Assistant Collector of Meerut, under s. 109 of Act XIX of 1873, for partition of a 7½ biswas share of a certain village, and notices were issued according to the provisions of s. 111, under which the appellants appeared and lodged objections, raising questions of title, and thereupon the Assistant Collector, in pursuance of the powers given by s. 113 of the same law, proceeded to inquire into the merits of such objections. After a full investigation and taking evidence on both sides, he in a lengthy decision, declared the respondent entitled to a share "in

the disputed property proportionate to his purchased 7½ biswas share in the village: the partition will now be proceeded with."

It appears that this decision was unfortunately not formally embodied in a decree, though it should be remarked that no question was raised upon that point by the appellants in their petition of appeal to the Judge, who, though he took notice of this defect in the proceedings of the lower Court, as set out in the learned Chief Justice's judgment, in the result confirmed the order of the Assistant Collector. In appeal, however, before us the learned counsel for the appellants has himself directed our attention to the fact that no decree was prepared in the Assistant Collector's Court, and he argued that as by the 3rd paragraph of s. 113 of the "Revenue Act," 1873, the procedure to be followed in partition matters is that "laid down in the Civil Procedure Code for the trial of original suits;" and as by s. 114 "orders and decisions passed by a Collector or Assistant Collector under s. 113 for declaring the rights of the parties shall be held to be decisions of a Court of Civil Judicature of the first instance, and shall be open to appeal to the District or High Court under the rules applicable to regular appeals to those Courts," it follows, as a necessary consequence, that for the purpose of making such orders and decisions effectual, it was essential that they should have expression given to them by formal decrees. I have taken time carefully to consider this point, being at first somewhat doubtful as to the construction to be placed on the 2nd paragraph of s. 113, "shall record a proceeding declaring the nature and extent of the interest of the party or parties applying for the partition, and any other party or parties who may be affected thereby." Reading ss. 113, 114 and 115 together, however, it seems to me that when a Collector or Assistant Collector has determined to make inquiry into objection raising question of title perferred under s. 113, his proceeding thereupon must be conducted and regarded as conducted in the same mode as an original suit in a Civil Court, in which it is obviously essential that a decree should be drawn up in order to give effect to the judgment of the Court. In this view of the matter, the decision of the Assistant Collector in the case before us should have been embodied in a decree, not only for the purpose of declaring the rights of the applicant as against his objectors and the method of the partition, but to

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supply a tangible basis on which an appeal could be perferred. I need not stop to argue that a decree is "*ex necessitate rei*" the imperative outcome of a civil suit: indeed, ss. 205 to 212 of the Code, the chapters dealing with attachment and proceedings in execution, the provisions regarding appeal and s. 644, with the forms to be found in Schedule IV of the Act, seem to presume this, otherwise they could have no practical effect or purpose. If, then, the procedure of the Collector or Assistant Collector in trying case under s. 113 "shall be that laid down in the Code of Civil Procedure for the trial of original suits," I do not think it unreasonable to hold that a decree is a necessary incident to his proceedings, as the embodiment of his decision in a proper and formal shape. I need not make any remarks, with regard to the views expressed by the learned Chief Justice as to the absence from the Civil Procedure Code of any mandatory provision in reference to the preparation of decrees. It seems enough to say that we both arrive at the same conclusion as to the necessity for a decree in a civil suit.

I regret that I find myself unable to concur in the opinion expressed in the last paragraph of the learned Chief Justice's judgment, or the order he proposes. There is to my mind no difference between this appeal and one in which a lower Court has acted without jurisdiction, and the matter comes before us in first or second appeal as the case may be. However defective it may turn out on examination, there is the decree of the Judge existing, and, as such, capable of appeal as declared in s. 115. It is only in virtue of the appeal so given to this Court that we are seized of the case, and are competent to pass any orders upon it. If the learned Chief Justice's view is correct, that no appeal lies to this Court, because no appeal lay to the lower Court, the only order we could properly pass would be to dismiss the appeal. As I have said, however, I think an appeal does lie from the decree of the Judge, and I would decree this appeal, and, reversing the decree of the Judge, would remit the case to the Court of the Assistant Collector, with a view to a formal decree being prepared in accordance with the decision of the 6th January, 1882. The costs hitherto incurred shall abide the result.