
(2010) 08 CHH CK 0036
In the Chhattisgarh High Court
Case No : First Appeal 169 of 2006

Sanat Kumar Sonkar and Rajendra Kumar Agrawal	APPELLANT
Vs	
Moti Lal Sonkar and Dharam Sonkar	RESPONDENT

Date of Decision : 02-08-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 1, Order 2 Rule 2, Order 2 Rule 2(2) , Order 2 Rule 2(3), Order 23 Rule 3
Limitation Act, 1963 — Section 22

Citation : (2010) 08 CHH CK 0036

Hon'ble Judges : T.P. Sharma, J;Rajeshwar Lal Jhanwar, J

Bench : Full Bench

Final Decision : Dismissed

Judgement

T.P. Sharma, J.—Challenge in this appeal u/s 96 of the Code of Civil Procedure, 1908 (for short "the Code") is to the judgment and decree dated 24-7-2006 passed by the 3rd Additional District Judge, Raipur in Civil Suit No. 43A/2005 dismissing the suit for specific performance of contract and permanent injunction.

2. Judgment and decree are impugned on the ground that by misapplication of the provisions of Order 2 Rule 2(2) of the Code, the Court below has committed illegality.

3. As per the claim of the plaintiff/appellant, the respondents owners of Khasra No. 1485/4 area 1.748 hectares situate at Bhathagaon, Raipur, had entered into an agreement to sell the aforesaid property to the appellant on 24-3-2002 and executed a "bayana chitti". After receiving advance of Rs. 60,500/- out of Rs. 5,37,000/- on 24-3-2002, the respondents handed over the possession of land to the appellant. The respondents have also received Rs. 30,410/-; Rs. 50,000/- and Rs. 1,86,000/- total Rs. 2,66,410/-. Finally the respondents have received Rs. 3,46,910/- from the appellant towards payment of sale amount, but they tried to dispossess the plaintiff/appellant from the suit land on which the appellant filed suit for declaration and permanent injunction against the

respondents in which both the parties filed compromise application under Order 23 Rule 3 of the Code in which the respondents have agreed the sale transaction and delivery of possession. The appellant was ready and willing to pay remaining amount of Rs. 1,85,090/- to the respondents to perform his part. The appellant has also spent money for development of the suit land. On the basis of compromise, previous suit bearing C.S. No. 3-A/2004 was decided in favour of the plaintiff by the 8th Additional District Judge, Raipur, vide judgment and decree dated 26-8-2004. The appellant made request for execution of sale deed, but the respondents were not ready to perform their part of contract. Finally suit for specific performance and permanent injunction was filed against the respondents.

4. The respondents have admitted ownership over the land, but have denied the transaction and execution of bayana chitti. The respondents have never handed over the possession of land to the appellant. Parties have not filed compromise application before the Court. The respondents have challenged the judgment and decree passed in C.S. No. 3-A/2004 before the High Court and the appeal is pending. The appellant was under obligation to include all claims, for which he was entitled, in C.S. No. 3-A/2004, but he has intentionally omitted to claim specific performance of contract and thereby he has relinquished his claim for specific performance of contract. During the subsistence of decree for permanent injunction as alleged by the appellant, the appellant is again not entitled for the relief of permanent injunction. Vide registered partition deed dated 13-4-2004, defendant No. 1 has made partition of the property and partition took place between both the respondents namely respondent No. 1 and daughter of respondent No. 1 Dharmin. The suit is not maintainable in terms of Order 2 Rule 2 of the Code.

5. On the basis of averments of the parties, issues were framed and after affording opportunity of hearing to the parties, learned Additional District Judge has dismissed the suit vide the judgment and decree impugned.

6. We have heard learned Counsel for the parties, perused the judgment and decree impugned and record of the Court below.

7. Mr. Krishna Murari Agrawal, learned Counsel appearing on behalf of the appellants, vehemently argued that for invoking the provisions of Order 2 Rule 2(2) of the Code, the party who claims such defence is required to file copies of pleadings and issues of previous suit, but in the present case, the respondents have not filed any such pleadings and issues of previous suit. The appellant has not concealed the material facts of previous suit and has pleaded in his plaint that previous suit was filed for declaration and permanent injunction relating to same property, at that time suit for specific performance was not necessary and no cause of action for filing of suit for specific performance arose at the time of filing of previous suit. Previous suit and present suit are based on same document bayana chitti and parties are same but causes of action are different. The plaintiff has not omitted or intentionally relinquished the claim for filing of

suit for specific performance of contract in the previous suit and therefore, the plaintiff is not precluded from filing present suit for specific performance of contract on the basis of bayana chitti. In the present suit, the respondents have not made specific denial of the allegations made in the plaint, especially relating to nature of pleadings in previous suit, filing of compromise application and judgment and decree on the basis of compromise application, and absence of specific denial of the aforesaid allegations, amounts to admission in accordance with Order 8 Rule 5 of the Code. Mr. Krishna Murari Agrawal further argued that the appellant has adduced sufficient evidence to prove issue Nos. 1 to 7. Witnesses of the respondents have also substantially admitted the claim of the plaintiff.

8. Mr. Krishna Murari Agrawal, learned Counsel appearing on behalf of the appellants, placed reliance in the matter of Gurbux Singh v. Bhooralal¹ in which the Apex Court has held that in order that a plea of a bar under Order 2 Rule 2(3) of the Code should succeed the defendant who raises the plea must make out (1) that the second suit was in respect of the same cause of action as that on which the previous suit was based; (2) that in respect of that cause of action the plaintiff was entitled to more than one relief; (3) that being thus entitled to more than one relief the plaintiff, without leave obtained from the Court, omitted to sue for the relief for which the second suit had been filed. Mr. Krishna Murari Agrawal further placed reliance in the matter of S. Nazeer Ahmed v. State Bank of Mysore and Ors. ² in which the Apex Court has held that burden to prove bar of Order 2 Rule 2 of the Code is on the defendant. Production of plaint in earlier suit to show the cause of action of that suit is mandatory. Mr. Krishna Murari Agrawal also placed reliance in the matter of M/s. Bengal Waterproof Limited v. M/s. Bombay Waterproof Manufacturing Company and Anr.³ in which the Apex Court has held that in absence of pleadings in first suit, no inference about bar under Order 2 Rule 2 of the Code can be drawn. Second suit on the basis of continuous cause of action is not bar under Order 2 Rule 2(3) of the Code. Mr. Krishna Murari Agrawal relied upon the matter of Harinarayan v. Narmadashankar⁴ in which the High Court of Madhya Pradesh has held that party ready and willing to perform obligation on his part in suit for specific performance of sale is entitled for decree. Mr. Krishna Murari Agrawal further relied upon the matter of Chhabrani (Smt.) v. Smt. Narbada Bai⁵ in which the High Court of Madhya Pradesh has held that party is required to plead and prove readiness and willingness to perform his part. Mr. Krishna Murari Agrawal also relied upon the matter of Ratansingh v. Nagu⁶ in which the High Court of Madhya Pradesh has held that factum of readiness and willingness of plaintiff to perform his part can be interfered from the circumstances and averments of plaint. Mr. Krishna Murari Agrawal placed reliance in the matter of V.E.A. Annamalai Chettiar and another v. S.V.V.S. Veerappa Chettiar and Ors. in which the Apex Court has held that document once admitted in evidence cannot be called in question at any stage of the proceedings on the ground that it has not been duly stamped.

9. Mr. S.C. Verma, learned Counsel for the respondents, vehemently opposed the

appeal and submitted that first civil suit No. 3-A/2004 was filed by the appellant herein for declaration and permanent injunction and for not interfering in the possession of the suit land, against the respondents on the basis of bayana chitti. In the previous suit, the appellant herein has not claimed the relief of specific performance of contract and has not included the claim of specific performance of contract which the appellant was entitled to claim in the first civil suit. The appellant herein/plaintiff has deliberately and intentionally omitted to sue and has relinquished the claim of specific performance of contract, therefore, the plaintiff/appellant herein is not entitled and is precluded from filing and claiming suit for specific performance of contract against the respondents in accordance with Order 2 Rule 2 of the Code. Mr. S.C. Verma further submitted that definitely the respondents herein have pleaded the aforesaid pleading relating to non-maintainability of subsequent suit under Order 2 Rule 2 of the Code and, therefore, they were required to prove the aforesaid allegation by filing copy of pleadings and issues. However, in the present case, the plaintiff/appellant herein himself has admitted the factum of previous suit in his pleadings. Therefore, on the basis of admission of the plaintiff, which is the best evidence under the Indian Evidence Act, nothing was required to prove the institution of previous suit between the parties relating to same property and the Court below has rightly dismissed the present suit filed on behalf of the plaintiff. Learned Additional District Judge has dismissed the suit substantially in terms of Order 2 Rule 2 of the Code.

10. As per pleadings, judgment and decree, it is not disputed that the respondents have executed agreement to sale of land bearing Khasra No. 1485/4 area 1.748 hectares in favour of the appellant herein on 24-3-2002 in the style of bayana chitti. As per para 7 of the plaint, the appellant herein had filed Civil Suit No. 3-A/2004 for declaration and permanent injunction which was finally decreed vide judgment and decree dated 26-8-2004. Thereafter, the plaintiff has filed present suit for specific performance of contract on the basis of alleged bayana chitti dated 24-3-2002. As held by the Apex Court in the matter of S. Nazeer Ahmed (supra), in order to prove and attract the provisions of Order 2 Rule 2 of the Code, the party who made allegation is under obligation to file copy of pleading with a view to prove the previous suit and its nature.

11. In the present case, the appellant herein/plaintiff has not denied filing of previous suit on the basis of bayana chitti for declaration and injunction against the respondents. Inter alia, the plaintiff himself has pleaded and verified the aforesaid facts in para 7 of his pleadings of the plaint. Admission is the best evidence to prove the facts. In the present case, the appellant herein/plaintiff has not only admitted the factum of previous suit but has pleaded in his plaint specifically and unambiguously. Therefore, any lapse on the part of the respondents in producing the copy of pleading will not affect the evidentiary value of admission and pleading made by the appellant herein.

12. As held by the Apex Court in the matter of Gurbux Singh (supra), in order

that a plea of a bar under Order 2 Rule 2(3) of the Code should succeed the defendant who raises the plea must make out (1) that the second suit was in respect of the same cause of action as that on which the previous suit was based, (2) that in respect of that cause of action the plaintiff was entitled to more than one relief, (3) that being thus entitled to more than one relief the plaintiff, without leave obtained from the Court, omitted to sue for the relief for which the second suit had been filed.

13. Definitely, in the present case, the relief claimed in the first suit of declaration and permanent injunction was based on the bayana chitti, alleged agreement to sale of the suit land by the respondents in favour of the appellant. The present suit is also based on the same agreement for specific performance of contract and for relief of permanent injunction. Virtually, in case of agreement of selling property by one party to another, the most essential relief which could be claimed by the party in whose favour the document is executed would be performance of alleged contract agreed between the parties, by both the parties. Another ancillary relief based on the right accrued on the basis of such agreement or may accrue in future, in such cases the first and foremost substantive relief which the party can claim is a suit for the relief of specific performance of contract, because bare agreement to sale does not give any substantive right to the parties unless such contract is fulfilled and performed in the manner provided. In the circumstances, the most substantive relief based on the agreement available to the plaintiff on the date of filing first suit was, the claim for specific performance of contract by showing his readiness and willingness against the respondents. But admittedly, the appellant herein has not included such claim in his first suit. The appellant herein has not obtained any permission from the Court for exclusion of such claim or reserving his right to claim such relief in future.

14. As held by the Apex Court in the matter of Gurbux Singh (*supra*), in the present case, definitely previous suit and present suit both are based on same cause of action, therefore, the appellant was under obligation to include the claim of specific performance of contract, but he has not included such claim in the previous suit.

15. While dealing with the question of bar created under Order 2 Rule 2 of the Code, the Apex Court in the matter of M/s. Bengal Waterproof (*supra*) has held that in case of continuous cause of action such bar will not operate. In the matter of M/s. Bengal Waterproof (*supra*), first suit was for recovery of dues of rent in one year and second suit was for recovery of dues of rent of another area. Although both the suits were based on same cause of action, but for different years and the suits were based on continuous cause of action. Even otherwise, in such cases, parties are required to file different suits in different years for recovery of rent of each year. In such cases, bar under Order 2 Rule 2 of the Code will not operate. Para 8 of the judgment of the Apex Court in M/s. Bengal Waterproof's case read thus,

As seen earlier, Order 2 Rule 2 Sub-rule (3) requires that the cause of action in the earlier suit must be the same on which the subsequent suit is based and unless there is identity of causes of action in both the suits the bar of Order 2 Rule 2 sub-rule (3) will not get attracted. The illustration below the said Rule amply brings out this position. A mere look at the said illustration shows that if a landlord sues the tenant in 1908 for the rent due till that year and omits to sue for rent for any of the previous years which had then accrued due he cannot subsequently sue the tenant for the previous rent due, claim for which was given up in the suit. It is obvious that a subsequent suit would not be barred in case of rent falling due after the first suit, say, for the year 1909 or 1910 etc. as that default would give him a fresh cause of action. In the facts of the present case it becomes obvious that when earlier suit was filed in 1980 the plaintiff had a cause of action regarding the alleged illegal use of his trade mark "DUCK BACK" by the defendants and had also a grievance regarding the then existing deceitful action of the defendants in trying to pass off its goods "DACK BACK" as if they were similar to the plaintiff's goods "DUCK BACK". Therefore, the cause of action for the first suit of 1980 was based on the infringement of plaintiff's trade mark "DUCK BACK" by the defendants till the date of the suit filed in 1980. The grievance regarding passing off of the defendants' goods as if they were plaintiff's goods was also confined to the situation prevailing on the date of the earlier Suit No. 238 of 1980. That suit failed as the plaintiff had not claimed proper relief. Consequently for the alleged acts of infringement of plaintiff's trade mark or the alleged passing off actions on the part of the defendants till the date of the earlier suit no subsequent grievance could be ventilated by the plaintiff's by filing a fresh suit. It is also pertinent to note that in the earlier suit, that is, the first suit the plaintiff had claimed Rs. 25,000/- by way of damages for the alleged illegal acts of the defendants which were brought on the anvil of scrutiny in the 1980 suit. So far as that cause of action is concerned no subsequent suit lies as it would be barred under Order 2 Rule 2 sub-rule (3). But we are concerned in the second suit with entirely a different grievance of the plaintiff. In the second suit, namely, the present suit the grievance is not based on any acts of infringement of passing off alleged to have been committed by the defendants in 1980 but plaintiff's grievance is regarding the continuous acts of infringement of its trade mark "DUCK BACK" and the continuous passing off action on the part of the defendants subsequent to the filing of the earlier suit and which had continued on the date of the second suit of 1982. The relevant averments regarding the fresh cause of action which had accrued to the plaintiff after the disposal of the earlier first suit are found in paragraphs 13 to 20 of the plaint in the present second suit. They read as under:

xxx xxx xxx

xxx xxx xxx

xxx xxx xxx

The aforesaid averments in the plaint clearly show that the present suit is not

based on the some cause of action on which the earlier suit was based. The cause of action for filing this present second suit is the continuous and recurring infringement of plaintiff's trade mark by the defendants continuously till the filing of the present second suit. We asked the learned Counsel for the defendants as to whether pending the suit and at present also the defendants are trading in the offending goods, namely, bearing the mark "DACK BACK" and he informed us that defendants even at present are carrying on this business. Therefore, pending the second suit all throughout and during the pendency of these proceedings the defendants have carried on the business of trading in the commodity waterproof raincoats "DACK BACK". It is obvious that thus the alleged infringement of plaintiff's trade mark "DUCK BACK" and the alleged passing off action on the part of the defendants in selling their goods by passing off their goods as if they were plaintiff's goods has continued all throughout uninterrupted and in a recurring manner. It is obvious that such infringement of a registered trade mark carried on from time to time would give a recurring cause of action to the holder of the trade mark to make a grievance about the same and similarly such impugned passing off actions also would give a recurring cause of action to the plaintiff to make a grievance about the same and to seek appropriate relief from the court. It is now well settled that an action for passing off is a common law remedy being an action in substance of deceit under the Law of Torts. Wherever and whenever fresh deceitful act is committed the person deceived would naturally have a fresh cause of action in his favour. Thus every time when a person passes off his goods as those of another he commits the act of such deceit. Similarly whenever and wherever a person commits breach of a registered trade mark of another he commits a recurring act of breach of infringement of such trade mark giving a recurring and fresh cause of action at each time of such infringement to the party aggrieved. It is difficult to agree how in such a case when in historical past earlier suit was disposed of as technically not maintainable in absence of proper reliefs, for all times to come in future defendant of such a suit should be armed with a licence to go on committing fresh acts of infringement and passing off with impunity without being subjected to any legal action against such future acts. We posed a question to the learned Counsel for the defendants as to whether after the disposal of the earlier suit if the defendants had suspended their business activities and after a few years had resumed the same and had started selling their goods under the trade mark "DACK BACK" by passing them off, the plaintiff could have been prohibited and prevented by the bar of Order 2 Rule 2 Sub-rule (3) from filing a fresh suit in future when such future infringement or passing off took place. He rightly and fairly stated that such a suit would not be barred. But his only grievance was that whatever was the infringement or passing off alleged against the defendants in 1980 had, according to the plaintiff, continued uninterrupted and, therefore, in substance the cause of action in both the suits was identical. It is difficult to agree. In cases of continuous causes of action or recurring causes of action bar of Order 2 Rule 2 sub-rule (3) cannot be invoked. In this connection it is profitable to have a look at Section 22 of the Limitation Act, 1963. It lays down

that "in the case of a continuing breach of contract or in the case of a continuing tort, a fresh period of limitation begins to run at every moment of the time during which the breach or the tort, as the case may be, continues". As act of passing off is an act of deceit and tort every time when such tortious act or deceit is committed by the defendant the plaintiff gets a fresh cause of action to come to the court by appropriate proceedings. Similarly infringement of a registered trade mark would also be a continuing wrong so long as infringement continues. Therefore, whether the earlier infringement has continued or a new infringement has taken place cause of action for filing a fresh suit would obviously arise in favour of the plaintiff who is aggrieved by such fresh infringements of trade mark or fresh passing off actions alleged against the defendant. Consequently, in our view even on merits the learned Trial Judge as well as the learned Single Judge were obviously in error in taking the view that the second suit of the plaintiff in the present case was barred by Order 2 Rule 2 sub-rule (3), CPC.

16. The present suit is not based on continuous cause of action. The cause of action for filing suit for specific performance of contract in favour of the appellant arose when, as per the claim of the appellant, the respondents tried to dispossess the appellant after placing him in possession, though we have not considered parting of possession in favour of the appellant or the case that whether the appellant was in possession or not. Definitely, as held by the Apex Court in the matter of M/s. Bengal Waterproof (supra), the appellant was under obligation to include all his claims which he was entitled to make in support of the cause of action in terms of Order 2 Rule 2 of the Code.

17. As regards non-maintainability of present suit in the light of the provisions of Order 2 Rule 2(2) of the Code, the plaintiff/appellant herein has not claimed specific performance of contract in previous suit and he has omitted such claim in previous suit. In accordance with the provisions of Order 2 Rule 2 of the Code, parties are required to include the whole claim for which they are entitled to make in respect of the cause of action, but the plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

18. Order 2 of the Code provides the provisions for framing of suit. Order 2 Rule 2 of the Code provides suit to include the whole claim and Order 2 Rule 2(2) of the Code makes the provision that if plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished. Rules 1 and 2 of Order 2 of the Code read as under:

1. Frame of suit.-Every suit shall as far as practicable be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them.

2. Suit to include the whole claim.-(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but

a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim.-Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs.-A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

Explanation.-For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.

19. While dealing with the question of inclusion and relinquishment of the claim coupled with the question of constructive res judicata in accordance with Explanation IV to Section 11 and Order 2 Rule 2 of the Code, the Apex Court has held in the matter of *Dadu Dayalu Mahasabha, Jaipur (Trust) v. Mahant Ram Niwas and another*⁸ that even if any concession is given by the Apex Court, then the principle of res judicata will apply and the Court while passing the judgment cannot take away the right of the successful party indirectly which it cannot do directly. An observation made by a superior court is not binding. Paras 22, 25, 26, 27 and 28 of the said judgment read as under:

22. The judgment of a court, it is trite, should not be interpreted as a statue. The meaning of the words used in a judgment must be found out from the backdrop of the fact of each case. The court while passing a judgment cannot take away the right of the successful party indirectly which it cannot do directly. An observation made by a superior court is not binding. What would be binding is the ratio of the decision. Such a decision must be arrived at upon entering into the merit of the issues involved in the case.

25. Explanation IV of Section 11 of the Code extends the principle of res judicata stating that the reliefs which could have been or ought to have been prayed for even if it was not prayed for would operate as res judicata. Section 12 thereof bars filing of such suit at the instance of a person who is found to be otherwise bound by the decision in the earlier round of litigation and in a case where the principle of res judicata shall apply.

26. We, however, are not unmindful of the principles of estoppel, waiver and res judicata are procedural in nature and, thus, the same will have no application in a case where judgment has been rendered wholly without jurisdiction or issues involve only pure questions of law. Even in such cases, the principle of issue estoppel will have no role to play.

27. However, once it is held that the issues which arise in the subsequent suit were directly and substantial in issue in the earlier suit, indisputably Section 11

of the Code would apply.

28. Similarly the provisions of Order 2 Rule 2 bars the jurisdiction of the court in entertaining a second suit where the plaintiff could have but failed to claim the entire relief in the first one. We need not go into the legal philosophy underlying the said principle as we are concerned with the applicability thereof.

20. While dealing with same question the Apex Court in the matter of Hope Plantations Ltd. v. Taluk Land Board, Peermade and another⁹ has held that an adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had it decided as incidental to or essentially connected with the subject-matter of the litigation and every matter coming within the legitimate purview of the original action both in respect of the matter of claim or defence. The principle underlying Explanation IV is that where the parties have had an opportunity of controverting a matter that should be taken to be the same thing as if the matter had been actually controverted and decided. It is true that where a matter has been constructively in issue it cannot be said to have been actually heard and decided. It could only be deemed to have been heard and decided. The first reason, therefore, has absolutely no force.

21. While dealing with same question the Apex Court in the matter of Kunjan Nair Sivaraman Nair v. Narayanan Nair and Ors. has held in para 13 as under:

13. Section 11 contains the rule of conclusiveness of the judgment which is based partly on the maxim of Roman jurisprudence "interest reipublicae ut sit finis litium" (it concerns the State that there be an end of law suits) and partly on the maxim "nemo debet bis vexari pro una et eadem causa" (no man should be vexed twice over for the same cause). The section does not affect the jurisdiction of the court but operates as a bar to the trial of the suit or issue, if the matter in the suit was directly and substantially in issue (and finally decided) in the previous suit between the same parties litigating under the same title in a court, competent to try the subsequent suit in which such issue has been raised.

22. In the present case, claim for specific performance of contract was available to the plaintiff/appellant herein at the time of filing previous suit, but the plaintiff has intentionally omitted and relinquished such claim without any leave of the Court. In these circumstances, the plaintiff/ appellant herein is precluded from filing such suit and claiming specific performance of contract against the respondents in accordance with Order 2 Rule 2(2) of the Code. Learned Additional District Judge has substantially dismissed the suit on the ground of its maintainability in the light of Order 2 Rule 2(2) of the Code. The present suit is not maintainable in the light of Order 2 Rule 2(2) of the Code.

23. Consequently, I do not find any merit in the appeal, same is liable to be dismissed and it is hereby dismissed. Parties shall bear their costs.

24. Advocate fees as per schedule.

25. Decree be drawn accordingly.