

It is neither a "conveyance," nor a "settlement," nor an "instrument of partition," within the meaning of Act I of 1879.

It is in its nature a deed of arrangement, by which a sum of money was paid absolutely, and a maintenance grant made by the Maharajah of Durbhungah to his younger brother, by way of discharge and satisfaction of all claims, by way of maintenance or otherwise, to which the latter was entitled as the son of the late Maharajah.

The instrument would, no doubt, have been a "conveyance" under the Stamp Act of 1869, because it is a deed by which property is conveyed *inter vivos*; but the definition of a conveyance in the Act of 1879 [see s. 3 (9)] excludes all transfers or conveyances, which are not made by way of sale, and this transfer, we consider, was clearly not made by way of sale.

1880
IN THE
MATTER OF
THE MAHA-
RAJAH OF
DURBHUN-
GAH.

Before Mr. Justice Cunningham and Mr. Justice Prinsep.

NILMONEY SINGH (PLAINTIFF) v. HEERA LALL DASS
(DEFENDANT).*

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March 14.

Rent Suit—Decree obtained ex parte—Admissibility of, as Evidence—Finality of, with regard to its Subject-matter—Civil Procedure Code (Act X of 1877), s. 13, expl. 4.

A decree obtained *ex parte* is not final within the meaning of expl. 4, s. 13 of Act X of 1877.

Such a decree is not conclusive evidence of the amount of rent payable by the same defendant in another suit for subsequent rent of the same property.

Where the plaintiff sued the defendant for a year's rent at the same rate which had been decreed to him for a previous year in a suit which he had brought against the same defendant for rent of the same property, and relied upon the former decree, which had been obtained *ex parte*, and which he also alleged had been duly executed, as evidence of the amount of rent due to him by the defendant, but it appeared that the lower Court had found that the alleged execution-proceedings were fraudulent, and that no steps had been taken which gave finality to the decree,—

* Appeal from Appellate Decree, No. 2272 of 1879, against the decree of R. Towers, Esq., Officiating Judicial Commissioner of Chota Nagpore, dated the 7th June 1879, affirming the decree of Baboo Radha Madhub Bose, Deputy Collector of Manbhoom, dated the 23rd January 1879.

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Held, that the decree was not conclusive evidence of the amount of rent due from the defendant or of the questions with which it dealt.

Birchunder Maniokya v. Hurrish Chunder Dass (1) distinguished.

THIS was a suit for the recovery of rent due for the year 1280 (corresponding with the years 1873-74), in which the plaintiff claimed Rs. 100-12-3½. The defendant, in his written statement, alleged, that the mouza in respect of which the suit was brought was his ancestral brohmutter property, subject to a quit-rent of Rs. 39-10 per annum, and that he had not paid the rent for 1280, as the plaintiff had demanded it at an enhanced rate.

The plaintiff, in support of his claim, produced a certified copy of a decree obtained *ex parte* in a previous rent-suit on the 20th May 1867, with reference to the same mouza and against the present defendant, for an amount similar to that which he now claimed; and further produced evidence to show that this decree had been executed in due course. The defendant, on the other hand, denied all knowledge of these proceedings, and alleged that they were collusively taken in order to fabricate evidence for the present suit.

The original Court found as a fact, that the alleged execution-proceedings were fraudulent, and the plaintiff having otherwise failed to make out his case, gave a decree only for Rs. 39-10, the amount admitted by the defendant as due.

The lower Appellate Court supported this finding, and following the decision in *Goya Pershad Aubustee v. Tarinee Kant Lahoree Chowdhry* (2) held, that the *ex parte* decree was not good evidence of the amount of jumma payable by the defendant.

From these two decrees the plaintiff then appealed to the High Court, on the ground that the lower Appellate Court was wrong in holding that the *ex parte* decree was not good evidence of the amount of the jumma, and that it was for the defendant to prove that the decree had been fraudulently obtained against him; and that, he having failed to do so, the lower Courts should have given a decree for the amount claimed.

Babop *Bhobany Churn Dutt* for the appellant.

(1) I. L. R., 3 Calc., 388.

(2) 28 W. R., 149.

Baboo *Munmohun Dass* for the respondent.

The judgment of the Court (CUNNINGHAM and PRINSEP, JJ.) was delivered by

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CUNNINGHAM, J.—In this case, in a suit for rent, an endeavour is made to use an *ex parte* decree obtained by the plaintiff as conclusive evidence against the defendant as to the amount of rent.

The defendant denies all knowledge of the decree; and the first Court considered the alleged execution to be fraudulent. The lower Appellate Court considered that the *ex parte* decree “was not good evidence” of the amount of rent; and, in the absence of any other sufficient evidence, it dismissed the plaintiff’s claim. We think that this view is correct. The decree being *ex parte* is not “final” within the meaning of expl. 4, s. 13 of the Code of Civil Procedure, so long as it is open to the Court, on the application of the parties, to modify it. As in this case the alleged execution was held to be fraudulent, and no proceedings had been had which gave finality to the decree, we think that the lower Appellate Court was right in holding that, in the absence of any proof of execution, the defendant was not precluded by the existence of the decree from contesting a question with which it dealt.

Our present decision does not conflict with that in *Birchunder Manickya v. Hurrish Chunder Dass* (1), inasmuch as the question here is whether the plaintiff had a right to use the *ex parte* decree as conclusive evidence.

The appeal is dismissed with costs.

Appeal dismissed.

(1) I. L. R., 3 Calc., 383.