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EMPEROR v. RAM BILAS.

Queen-Empress v. *Khushali Ram*, (1) laid down no hard and fast rule upon this point. The learned Chief Justice, who decided that case, held that if a jury required evidence, evidence should be produced before it, and that in that case it was for the Magistrate to show by evidence that the obstruction referred to was an obstruction of a public way or in a public place. So far as I can see, Chapter X does not lay down any rules as to the procedure that must be adopted by a jury. The questions which are now raised are questions which, it appears to me, should have been raised by or on behalf of the firm long ago in the case.

It has been held by a learned Judge of this Court in *In the matter of the petition of Lachman* (2) that a person who applies for a jury is bound by the verdict of the jury and cannot raise such a plea as that the obstruction was caused in the exercise of a *bonâ fide* claim of right. So far as I can judge from the record, the firm of Ram Karan Ram Bilas had long and sufficient notice of the action which the Divisional Magistrate intended to take, and I am not prepared in revision to interfere. I dismiss the application.

APPELLATE CIVIL.

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May 7.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Karamat Husain.

PABITRA KUNWAR (PLAINTIFF) *v.* THE MAHARAJA OF BENARES (DEFENDANT).*

Procedure—Refusal of Court of first instance to examine all the plaintiff's witnesses—Appeal by defendant decreed—Remand.

Owing to the direction of the Court of first instance only a portion of the evidence available in support of the plaintiff's case was recorded by that Court, which decreed the plaintiff's suit. On appeal, however, the lower appellate Court took a different view of the plaintiff's evidence and dismissed the suit. *Held* that the plaintiff should be given an opportunity of producing the evidence which had not been recorded owing to the attitude taken up by the Court of first instance. *Kifayat-ullah Mondol* v. *Sakina Bibi* (3) and *Kalyani Prasad* v. *Bishnath* (4) referred to.

IN a suit pending in the Court of the Munsif of Benares, owing to the failure of the defendant to comply with an order of

* Second Appeal No. 685 of 1907 from a decree of G. A. Paterson, District Judge of Benares, dated the 7th of March 1907, reversing a decree of Hira Lal Singh, Munsif of Benares, dated the 21st of December 1906.

(1) (1895) I. L. R., 18 All., 158. (3) (1897) 11 C. W. N., p. xcii.
(2) Weekly Notes, 1900, p. 180. (4) Weekly Notes, 1905, p. 266.

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the Court his defence was struck out. The suit was proceeded with *ex parte*. The plaintiff had produced part of the evidence upon which she relied in support of her claim, when the Munsif intimated that, inasmuch as the suit was undefended, there was sufficient evidence already on the record and passed a decree in favour of the plaintiff. The defendant appealed to the District Judge, who, being of opinion that the evidence recorded was not sufficient to support the plaintiff's claim, allowed the appeal and dismissed the suit, without giving the plaintiff an opportunity, which was asked for, of producing the rest of her evidence. The plaintiff appealed to the High Court.

Dr. *Satish Chandra Banerji* (for whom Babu *Surendra Nath Sen*), for the appellant.

Munshi *Gokul Prasad*, Babu *Sital Prasad Ghosh* and Babu *Satya Chandra Mukerji*, for the respondent.

STANLEY, C. J., and KARAMAT HUSAIN, J.—We think that the learned District Judge was wrong in dismissing the plaintiff's suit without first giving her an opportunity of examining all the witnesses whom she was prepared to examine before the Court of first instance. It appears that by reason of default of the defendant in complying with the order of the Court his defence was struck out and the suit was heard *ex parte*. Before the plaintiff had examined all her witnesses the Munsif intimated that, inasmuch as the case was undefended, there was sufficient evidence already on the record, and passed a decree in favour of the plaintiff. On appeal the learned District Judge was not satisfied that the evidence on the record was sufficient to establish the plaintiff's claim. A representation was made to him that all the evidence which was available had not been produced by the plaintiff before the Munsif. In view of this we think that the learned District Judge ought not to have dismissed the plaintiff's suit, but ought to have remanded the suit to the Court of first instance with directions that it be retried, an opportunity being given to the plaintiff of examining her witnesses and adducing all her evidence. This was the course which was adopted in *Kifayat-ullah Mondol* v. *Sakina Bibi* (1). It is supported by the decision of a Bench of

(1) (1897) 11 C. W. N., p. xcii.

this Court in *Kalyani Prasad* v. *Bishnath* (1). We therefore allow the appeal. We set aside the decrees of both the lower Courts, and we remand the suit through the lower appellate Court to the Court of first instance with directions that it be reinstated on the file of pending suits in its original number and be disposed of on the merits. Costs here and hitherto will abide the event.

Appeal decreed and Cause remanded.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Karamat Husain.

1908. *May* 8.

RAM ANANT SINGH AND ANOTHER (PLAINTIFFS) v. SHANKAR SINGH (DEFENDANT).*

Landlord and tenant—Concurrent leases—Landlord entitled to recover rent only as against second lessee.

Held that where a lessor executes two concurrent leases of the same property, that is to say, two leases in which the term of the second commences before the term of the first has expired, the second lessee is to be taken as the assignee of the lessor's interest during the concurrent portion of the terms, and the lessor after the execution of the second lease can recover rent only from the second and not from the first lessee. *Harmer* v. *Bean* (2) followed.

THE plaintiffs in this case were owners of a share in a village called Chingauri in the Mirzapur district. On the 16th of June 1900, they executed a lease of this property in favour of one Raghunath Singh for a term extending from 1308 to 1314 Fasli at an annual rent of Rs. 395. Subsequently, namely, on the 12th of April 1904, the plaintiffs executed another lease of the same property at the same rent, but extending from 1312 to 1320 Fasli, in favour of one Shankar Singh. Under this lease Shankar Singh was authorized to realize the rent from the first lessee Raghunath Singh. Shankar Singh failed to pay the rent due from him for 1312-1313 Fasli and the lessors accordingly sued for its recovery. The Court of first instance (Assistant Collector) gave the plaintiffs a decree. On appeal, however, the District Judge reversed this decree and dismissed the plaintiffs' suits. The plaintiffs thereupon appealed to the High Court.

*Second Appeal No. 556 of 1907, from a decree of Syed Muhammad Ali, District Judge of Mirzapur, dated the 5th of February 1907, reversing a decree of Kunwar Jagdish Prasad, Assistant Collector 1st class of Mirzapur, dated the 17th of November 1906.

(1) Weekly Notes, 1905, p. 266. (2) (1853) 3 C. and K., 307.