FULL BENCH.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Mitter, Mr. Justice Prinsep, Mr. Justice Wilson, Mr. Justice Tottenham, Mr. Justice Norris, Mr. Justice Pigot, Mr. Justice O'Kinealy, Mr. Justice Macpherson, Mr. Justice Trevelyan, Mr. Justice Ghose, Mr. Justice Beverley and Mr. Justice Banerjee.

1889 *February 27.*

MODHUSUDUN SHAHA MUNDUL AND OTHERS (DEFENDANTS) *v.* BRAE (PLAINTIFF).*

Res Judicata—Evidence—Estoppel—Ex-parte decree, Effect of—Rate of rent—Rent suit—Civil Procedure Code (Act of 1882), s. 13.

A mere statement of an alleged rate of rent in a plaint in a rent suit in which an *ex-parte* decree has been obtained, is not a statement as to which it must be held that an issue within the meaning of s. 13 of the Code of Civil Procedure was raised between the parties so that the defendant is concluded upon it by such decree.

Neither a recital in the decree of the rate of rent alleged by the plaintiff, nor a declaration in it as to the rate of rent which the Court considers to have been proved, would operate in such a case so as to make that matter a *res judicata*, assuming that no such declaration were asked for in the plaint as part of the substantive relief claimed, the defendant having a proper opportunity of meeting the case.

REFERENCE to a Full Bench made by Mr. Justice PIGOT and Mr. Justice RAMPINI. The following is the order of reference :—

"In these appeals the question is raised, as to the effect in a suit for rent, of a previous decree for rent between the same parties, or persons, whom the parties represent in interest.

"In appeal No. 1966 of 1887 the plaintiff has obtained a decree for rent at the rate of Rs. 113-9-7, the rate claimed in his plaint. The defendant contended that the rent was Rs. 70-8 On behalf of the plaintiff two decrees were put in, made by the Deputy Collector of Magura, one in 1861 and the other in 1863 Those decrees were made *ex-parte*. Translations are annexed to this reference.

"The first is a decree for Rs. 2-12-1-3 cowries, the rate of rent alleged by the plaintiff being stated in the decree to be Rs 113-9-7 'more or less.'

* Full Bench on Special Appeals Nos. 1960 and 1966 of 1887, against the decrees of the Subordinate Judge of Jessore, dated 13th July 1887, reversing the decrees of the Munsiff of Magura, dated 18th February 1887.

"The second is for Rs. 13-10-3-3 cowries, the rate of rent alleged by the plaintiff being stated in the decree to be 'a variable rent' of Rs. 113-9-7. We do not understand that anything turns on the expression 'more or less' or 'variable' in the allegations of the plaintiff so recited.

"The plaints in these suits are not in evidence.

"In appeal No. 1960 of 1887 the plaintiff has obtained a decree at the rate of Rs. 43-15; the defendant contended that the rate was Rs. 30 only. On behalf of the plaintiff an *ex-parte* decree, made by the Deputy Collector of Magura in 1863, was put in for Rs. 10-7-7-2, arrears of rent, the rate of rent alleged by the plaintiff being stated in the decree to be 'a variable rent' of Rs. 43-15.

"It is not disputed that the parties in each of these appeals represent the parties between whom the above-mentioned *ex-parte* decrees respectively were passed.

"There is nothing before us to show that any of the *ex-parte* decrees were executed.

"The Lower Appellate Court in each case has made a decree in favour of the plaintiff, holding the defendant absolutely estopped, it not being shown that the decree was fraudulently obtained, or that the rate has been changed since the passing of the decree.

"It is contended on the part of the defendants, appellants, that in such a case no estoppel arises; or that, if any estoppel arises, it is limited to this, that the defendant is by it estopped from denying that the amount of arrears of rent for which the *ex-parte* decree was made, was due.

"The cases in this Court seem to us to conflict upon this question.

"We therefore submit the following questions to the Full Bench:—

First.—Whether an *ex-parte* decree for arrears of rent operates so as to render the question of the rate of rent *res judicata* between the parties?

Second.—Whether it so operates, if the rate of rent alleged by the plaintiff is recited in the decree, without any express declaration that the rate of rent so alleged has been proved?

1889

MODHU-SUDUN SHAHA MUNDUL v. BRAM.

Third.—Whether it so operates, if the rate of rent alleged is expressly declared by the decree to have been proved?

Fourth.—Whether an *ex-parte* decree operates so as to render any question decided by the decree *res judicata*, in the absence of proof that such decree was executed?

"The third question does not, strictly speaking, arise in the present case; but it seems to us to be so connected with the general question before us, that we submit it in case the Full Bench should feel at liberty to answer it.

"The cases in this Court to which we refer are the following:—*Ram Sunder Tewari* v. *Srimunt Dewasi* (1); *Heera Lall Seal* v. *Joheer Mollah* (2); *Beerchunder Manick* v. *Ramkishen Shaw* (3); *Goya Pershad Aubustee* v. *Tarinee Kant Lahoree* (4); *Birchunder Manickya* v. *Hurrish Chunder Dass* (5); *Nilmoney Singh* v. *Heera Lall Dass* (6); *Bhugirath Patoni* v. *Ram Loochun Deb* (7).

Baboo *Rash Behari Ghose* (with him Baboo *Saroda Churn Mitter*) for the appellant.

Ex-parte decrees cannot be used as estoppels. In *Goya Pershad Aubustee* v. *Tarinee Kant Lahoree* (4), the question was as to the effect of an *ex-parte* decree as evidence. The only question decided in *Beerchunder Manick* v. *Ramkishen Shaw* (3) was whether the decree was or was not admissible in evidence, and it was held it was for what it was worth. The judgment in this case is explained in *Birchunder Manickya* v. *Hurrish Chunder Dass* (5). *Ex-parte* decrees have been held not to be final decrees and not estoppels, but on a somewhat different ground, *viz.*, under s. 13, cl. 4 of the Civil Procedure Code; the mere statement of an alleged rate of rent in a plaint in a rent suit is not such a material allegation, as that without such allegation the plaintiff would be unable to obtain a decree at a different rate from that

(1) 14 B. L. R., 371; 10 W. R., 215.
(2) 20 W. R., 273.
(3) 14 B. L. R., 370; 23 W. R., 128.
(4) 23 W. R., 149.
(5) I. L. R., 3 Calc., 363.
(6) I. L. R., 7 Calc., 23; 8 C. L. R., 257.
(7) I. L. R., 8 Calc., 275.

alleged. See also *Nilmoney Singh* v. *Heera Lall Dass* (1) ; *Bhugirath Patoni* v. *Ram Lochun Deb* (2) ; *Heera Lall Seal* v. *Joheer Mollah* (3) ; see also *Goucher* v. *Clayton* (4) ; also the *Duchess of Kingston's case* (5).

Baboo *Upendro Nath Mitter* for the respondent.

Ex-parte decrees operate so as to render the question of rate of rent *res judicata.—Birchunder Manickya* v. *Hurrish Chunder Dass* (6) ; and *Puncharam Mundul* v. *Krishnapria Dasi*, [unreported (special appeal, No. 1271 of 1887, decided on the 22nd March 1888.)] The Court supposes in *ex-parte* decrees that the defendant denies the material statements made by the plaintiff.

The opinion of the Full Court was as follows :—

These cases being appeals from appellate decrees, it devolves upon this Bench, according to the practice of the Court in references to a Full Bench, to decide the appeals.

The questions referred to us relate to the effect to be given to the *ex-parte* decrees for rent mentioned in the reference, and arise by reason of a conflict in the decisions of this Court as to the effect to be given to such decrees. In the present case the *ex-parte* decrees were decrees of a Deputy Collector ; but the conflict of cases relates to the effect of decrees of Civil Courts generally, and with this wider question we think it proper to deal.

In *Birchunder Manickya* v. *Hurrish Chunder Dass* (6) the plaintiff sued the defendant for rents for the year 1279 at the same rate as had been decreed to the plaintiff for the year 1278 in a suit brought against the defendant with respect to the same property. The plaintiff relied upon an *ex-parte* decree obtained by him in that suit as showing the amount of rent due to him. The case came in 1874 before this Court in appeal from the decision of the District Judge of Tipperah, who had held that, inasmuch as no steps had been ever taken to execute the former decree,

(1) I. L. R., 7 Calc., 23 ; 8 C. L. R., 247.
(2) I. L. R., 8 Calc., 275.
(3) 20 W. R., 273.
(4) 11 Jur. N. S., 107.
(5) 2 Sm. L. C. (8th Ed.), 818.
(6) I. L. R., 3 Calc., 383.

1889

MODHU-SUDUN SHAHA MUNDUL v. BRAE.

and it had become barred by limitation, it became inoperative and could not be used in evidence.

The case was referred by the Bench before which it came to a Full Bench, to determine the question whether the decree could be used in evidence.

The Full Bench held that the decree was admissible in evidence, the question of its value to be determined by the lower Courts. The case was remanded for a re-hearing. It went back to the District Judge, who found that, having been obtained *ex-parte*, the decree was of no value, and ought to be disregarded. He then sent back the case to the Munsiff to try the question of amount without reference to the former decree, which was accordingly done.

The case in 1878 again came on second appeal to this Court; it was heard by a single Judge; and from his decision an appeal was preferred under clause 15 of the Letters Patent.

It was held, on this appeal, that the decree was binding on the defendants. The learned Chief Justice said [in *Birchunder Manickya* v. *Hurrish Chunder Dass* (1)]:—

"The Judge pronounced the decree to be of no value as evidence, merely because it had not been contested by the defendants. In this we consider he was quite wrong; a decree obtained *ex-parte* is, in the absence of fraud or irregularity, as binding, for all purposes, as a decree in a contested suit. If it were not so, a defendant in a rent suit might always, by not appearing and allowing judgment to pass against him without resistance, prevent the plaintiff from ever obtaining a definite judgment as to what is the proper amount of rent due from him to his landlord."

According to this decision, therefore, an *ex-parte* decree in a rent suit is conclusive as to the rate of rent alleged in the proceedings in the suit, the question as to the rate becoming by virtue of the decree *res judicata*.

According to this decision, also, the fact that no execution had ever been taken out by the decree-holder upon his *ex-parte* decree, does not prevent the decree having, against the defendant, the conclusive effect attributed to it.

In *Goya Pershad Aubustee* v. *Tarinee Kant Lahoree* (2), before Phear and Morris, JJ., which was a rent suit, the question arose

(1) I. L. R., 3 Calc., 383, at p. 388.

(2) 23 W. R., 149.

as to the effect to be given to an *ex-parte* decree for rent in a former suit between the plaintiff and the predecessor of the defendant. The question, as raised, was as to the effect to be given to such a decree as evidence. The learned Judges say:

"It seems to us, however, that the Munsiff was right in the view which he took of the effect of this decree considered as evidence between the parties, namely, that it is only evidence that Rs. 43 odd was, at the time when the decree was passed, due in respect of rent from the defendants to the plaintiff. The allegations made in the claim, so far as we can learn, were not converted into issues: the suit was tried *ex-parte* by reason of the non-appearance of the defendants; and no issues of fact seem to have been raised beyond the general issue involved in the claim, whether or not the Rs. 43 odd was due from the defendants to the plaintiff in respect of the rent claimed."

In the latter case, that of *Goya Pershad Aubustee* v. *Tarinee Kant Lahoree* (1) the decree was considered only with reference to its value as evidence, and the question whether, so far as it was evidence, it operated as conclusive proof under s. 40, was not discussed. It is, however, a decision upon the question before us in this reference, inasmuch as it decided that the *ex-parte* decree then under consideration was relevant, not to the question raised as to the rate of rent, but only upon the question whether or not the Rs. 43 odd was, at the time the decree was passed, due in respect of rent from the defendant to the plaintiff.

Upon this question, therefore, the decisions in *Goya Pershad Aubustee* v. *Tarinee Kant Lahoree* (1) and *Birchunder Manickya* v. *Hurrish Chunder Dass* (2) are in direct conflict.

A later decision in this Court, not reported, and not mentioned in the reference to this Full Bench, was referred to in argument before us. It is the decision in the case of *Puncharam Mundul* v. *Krishna Pria Dasi* (Appeal from Appellate Decree, No. 1271 of 1887, decided 22nd March 1888).

In that case the learned Judges arrived at the same conclusion as that accepted in the case of *Birchunder Manickya* v. *Hurrish Chunder Dass* (2). They say:—

"When an undefended suit goes to trial, the plaintiff is put in the same position that he would have been if the defendant had appeared and simply said 'I deny all your allegations,' in which case the plaintiff would have to prove everything which would be necessary for him to prove in order

(1) 23 W. R., 149. (2) I. L. R., 3 Calc., 383.

1889

MODHU-SUDUN SHAHA MUNDUL v. BRAE.

to make out his case, and therefore every material allegation in his plaint may be said to be denied because he has to prove them. When therefore this matter came before the Judge under these circumstances, the plaintiff had to prove that the defendant was his tenant of the tenure in question, and that the rent which the defendant had to pay on account of this tenure was at the rate of Rs. 7 and odd annas a year, and he also had to prove the amount of the rent in arrear, so that, all these allegations having to be proved, they are within the meaning of s. 13 of the Civil Procedure Code impliedly denied by the defendant."

It was argued before us that the statement in the plaint of an alleged rate of rent, in such a case, would not be an allegation so material that, in the absence of proof of it, the plaintiff could not obtain a decree, even although he were to show conclusively that the amount of rent claimed in the suit was actually due, on the footing of a different rate of rent from that mentioned in the plaint being the true rate.

We think this argument well founded. We think that, if at the hearing of such a suit, the plaintiff were to prove that the amount claimed by him as rent was actually due, although he did not establish the rate named by him in his plaint, he might nevertheless be entitled to a decree. That such a case might possibly arise is obvious. If it might, it follows that the statement of the rate of rent in the plaint is not necessarily an allegation so material that the determination of it in the affirmative is involved in the act of the Court in making a decree.

It follows from this that, in our opinion, the mere statement of an alleged rate of rent in the plaint in a rent suit in which an *ex-parte* decree is made, is not a statement as to which it must be held that an issue within the meaning of s. 13 of the Code of Civil Procedure was raised between the parties so that the defendant is concluded upon it by such decree.

We are of opinion, also, that neither a recital in the decree of the rate alleged by the plaintiff, nor a declaration in it as to the rate of rent which the Court considers to have been proved, would operate in such a case so as to make that matter a *res judicata*; assuming, of course, that no such declaration were asked for in the plaint as part of the substantive relief claimed, the defendant having a proper opportunity of meeting the case.

1889

MODHU-SUDON SHAHA MUNDUL v. BRAE.

On the above assumption our answer, therefore, to the first three questions is in the negative.

As to the fourth question, the matter was not so fully argued before us as to make it desirable that we should come to any decision upon it.

The result is that we allow the appeals, set aside the decrees of the Lower Appellate Courts in both suits, and remand the cases for a decision on the merits. The respondent to pay the costs of the appeal in each case.

T. A. P. *Appeals allowed.*

PRIVY COUNCIL.

HEWANCHAL SINGH AND ANOTHER (PLAINTIFFS) *v.* JAWAHIR SINGH (DEFENDANT.)

P. C.*
1888
November 3.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Redemption right of—Redemption claimed under terms of mortgage—Insufficient tender of mortgage money—Transfer of Property Act (IV of 1882), ss. 60, 83, and 84.

According to the judgment of the Appellate Court below, a mortgagor, having liberty by the terms of his mortgage to redeem at the end of its second year, on payment of the whole of the principal and interest, was not entitled to a decree for redemption, in a suit brought after the close of the second year, on showing only that in the first half of the second year, the principal money had been deposited in Court, and that for the interest, for both years, decrees had been obtained by the mortgagee against him, before his suit was instituted. The above not showing payment or tender of the interest, of which payment was secured by the mortgage, an appeal was dismissed.

APPEAL from a decree (9th November 1885) of the Judicial Commissioner, reversing a decree (30th July 1885) of the District Judge of Sitapur. A mortgage, dated 9th February 1883, secured repayment of Rs. 14,500 with interest, by the appellants to the respondent, and contained the following: "The first condition is that the term of the mortgage has been settled as eight years; within this term the mortgage may be redeemed upon payment of the entire sum, according to the conditions of the mortgage-bond at the close of the second, fourth, or

* *Present:* LORD FITZGERALD, LORD HOBHOUSE, and SIR R. COUCH.