

D. A. Khare, for the accused.

PER CURIAM :—Mr. Khare, the learned Pleader for the opponent, in showing cause why the sentence should not be enhanced, asks us to allow him to discuss the evidence and satisfy us that his client has been wrongly convicted. But we cannot allow that as it has been the invariable practice of this Court in such cases to accept the conviction as conclusive and to consider the question of enhancement of sentence on that basis. That practice has been consistently adhered to by this Court for over 25 years now, and ought, we think, to be followed. It was open to the opponent to apply for revision of the conviction, but having failed to avail himself of that, he cannot be permitted to assail the conviction in a proceeding where the sole question is whether the sentence passed by the lower Court is adequate or not. We enhance the sentence to one of rigorous imprisonment for two months in addition to the sentence of fine passed by the Magistrate which is to remain.

R. R.

ORIGINAL CIVIL.

Before Mr. Justice Davar.

MEGHBAL v. POONJABAL.*

High Court Rules, Rule 80 (a 1)†—Pauper, petition to sue as—Prothonotary's decision—Application to Judge in Chambers—Right to be heard.

1907.

March 16.

The plaintiff filed a petition to be allowed to continue her suit in *formâ pauperis*. The petition was heard by the Prothonotary under Rule 80 (a) of the Bombay High Court Rules, 1901. The petitioner applied under Rule 80 (a 1) to have the matter adjourned into Court :

Held, that the party dissatisfied with the Prothonotary's decision is entitled to apply to the Chamber Judge to have the matter adjourned to him, and that the Judge in Chambers is bound to decide the matter for himself.

* Pauper Petition No. 17 of 1906.

† Rule 80 (a 1) of the High Court Rules (1st Edn.) runs as follows :—

Any party desiring to have any question decided by the Prothonotary, whether disputed or not, adjourned to the Judge, may apply to the Judge in Chambers for such adjournment, within eight days of the issuing of the order complained of or within such further period as the Judge for sufficient cause may allow.

1907.

MEGHBAI
v.
POONJABAI.

APPLICATION to Chamber Judge.

The facts appear from the Judgment.

DAVAR, J. :—The plaintiff in Suit No. 458 of 1905 filed this petition praying that she may be allowed to continue this suit in *forma pauperis*. The matter was fully heard by the Prothonotary who, after recording evidence, delivered judgment on the 5th of February last, refusing to give leave to the plaintiff to continue the suit in *forma pauperis*. On the 19th of February the petitioner's attorney applied to me in chambers under Rule 80 (*a 1*) to have the matter adjourned to me. I directed notice of this application to be given to the defendant's attorneys. On the 23rd of February last I heard the defendant's attorney and then made an order adjourning the matter to the Judge in chambers. The matter was fully argued before me on the 4th of March 1907 by Mr. Thakordas for the petitioner and Mr. Jamietram for the respondents. When adjourning the matter into chambers I gave directions at the request of the defendant's attorney to the plaintiff's attorney to file in the Prothonotary's office the grounds on which the application was based. This has been done.

Rule 80 (*a 1*) is of recent introduction and I believe this is the first application under the Rule to the Chamber Judge. I was in doubt as to what was the extent of the powers conferred on the Judge in chambers by this Rule and as to whether the proceedings before me were in the nature of an appeal, review, or revision. I find that this Rule is framed from the practice followed in England under Order 55. Rule 15 under this Order provides for the delegation of some of the duties of the Judges of the Chancery Division to their Chief Clerks and Rule 69 provides for the taking of the opinion of the Judge. In *Upton v. Brown*⁽¹⁾ the Master of the Rolls expressly recognises the right of the party to have every item in an account in the course of being taken by the Chief Clerk adjourned to the Chamber Judge if the party is dissatisfied with the decision of the Chief Clerk. Then again in the case of *Smith v. Watts*⁽²⁾, in discussing the question of adjournment to the Judge, Sir George Jessel, Master of the Rolls, says: "The Chief Clerk decided against them, and they

⁽¹⁾ (1882) 20 Ch. D. 731.⁽²⁾ (1882) 22 Ch. D. 5 at p. 12.

then took the case to the Judge. That is not an appeal. They were entitled to have the opinion of the Judge." And Lord Justice Cotton follows up by the observation that the losing party has a right to *require* that the matter should be decided by the Judge himself.

Formerly all pauper investigations used to be put on the Board of a Judge hearing short causes and they were dealt with by the Judge. This duty is now under the Rules delegated to the Prothonotary and this has worked most satisfactorily and has saved a great deal of the Court's time. On the authorities however and under Rule 80 (*a* 1) it seems to be the right of a party dissatisfied with the Prothonotary's decision to apply to the Judge to have the matter adjourned to him and I take it that the Judge in chambers is bound to take up the matter and decide the matter for himself.

ORIGINAL CIVIL.

Before Mr. Justice Macleod.

RANCHHOD BHAWAN (PLAINTIFF) v. MANMOHANDAS RAMJI
AND ANOTHER (DEFENDANTS).*

1907.

August 26.

Indian Contract Act (IX of 1872), section 73—Vendor and purchaser—Contract to sell immoveable property—Damages for breach of such contract.

The rule in *Flureau v. Thornhill* (1) is not law in this country.

Section 73 of the Contract Act imposes no exception on the ordinary law as to damages, whatever the subject-matter of the contract. In cases of breach of contract for sale of immoveable property through inability on the vendor's part to make a good title the damages must be assessed in the usual way unless it can be shown that the parties to the contract expressly or impliedly contracted that this should not render the vendor liable to damages.

Pitamber Sundarji v. Cassibai (2) distinguished.

THE facts of this case are clearly set forth in the Judgment.

Robertson and P. Sorabji Talyarkhan for plaintiff.

Strangman and Setalvad for defendants.

* Original Suit No. 416 of 1906.

(1) (1776) 2 W. Bl. 1078.

(2) (1886) 11 Bom. 272.