money, the party who should be held liable to make the refund ought to be the judgment-debtor. One answer to this contention would be this:—That if this was the right view of the matter it would clash with the provision made by the Legislature in section 315 of the Code of Civil Procedure which directs that in the event of a sale of immoveable property being set aside under section 312 or 313 of the Code of Civil Procedure, or "when it is found that the judgment-debtor had no saleable interest in the property which purported to be sold, and the purchaser is for that reason deprived of it, the purchaser shall be entitled to receive back his purchase-money (with or without interest as the Court may direct) from any person to whom the purchase-money has been paid." This section contemplates the possibility of the purchase-money having been paid to the decree-holder, and yet it provides that the refund in the event of the sale being set aside should be made by the party to whom the money has been paid. It ought not to make any difference if the sale has been set aside not for any of the grounds mentioned, or referred to, in section 315, but for a worse reason, that is, owing to the sale having been vitiated by fraud on the part of the decree-holder's agents, nor does it make any difference if the decree is now barred and the decree-holder is unable to enforce it as against the judgment-debtors, when the judgment-debtors did nothing to bring about the difficulty in which the decree-holder may now find himself. That being so, the contentions urged before me fail, and this appeal must be dismissed with costs.

The defendant then appealed under s. 15 of the Letters Patent.

Babu *Shib Chunder Palit*, for the appellant.

Babu *Bipin Behary Ghose*, for the respondents.

[335] MACLEAN, C. J. I think the view taken by the learned Judge in the Court below is quite right. There are many difficulties in the path of the appellant. I do not think the case falls within section 244, Code of Civil Procedure. It is not, to my mind, a question between the parties to the suit or their representatives and relating to the execution of the decree. But even if it were the suit may be taken as one instituted in a Court which had jurisdiction to execute the decree, and the plaint may be regarded as an application to the Court for determining the question raised in the litigation, *viz.*, whether the purchaser was entitled to a refund of the money from the decree-holder to whom the money had been paid. The appeal is dismissed with costs.

BODILLY AND MOOKERJEE, JJ., concurred.

Appeal dismissed.

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32 C. 336 (=9 C. W. N. 610=1 C. L. J. 134.)

[336] CIVIL RULE.

Before Mr. Justice Prinsep and Mr. Justice Hill.

GHANESHYAM MISSER *v.* PADMANAND SINGH.*

[14th March, 1903.]

Record of rights—Bengal Tenancy Act (VIII of 1885), ss. 107, 109—*Undisputed entry —Presumption of accuracy how rebutted.*

The presumption under s. 109 of the Bengal Tenancy Act (VIII of 1885) in favour of the accuracy of an undisputed entry as to the rate of rent is sufficiently rebutted by the decree in a contested suit *inter partes* showing a different rate.

Section 109 of the Bengal Tenancy Act lays down a rule of evidence; it does not override the rules of *res judicata* which are of general application.

[Diss. 5 C. L. J. 92; (Res judicata—Rate of rent); Ref. 7 C. L. J. 512; 11 C. W. N. 153 (Suit by co-sharer for fractional share of rent).]

RULE granted to Ganeshyam Misser, the defendant-respondent.

*Civil Rule No. 2876 of 1902, in Second Appeal No. 1188 of 1898.

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The facts material to this report are as follows: The plaintiffs brought a suit for arrears of rent for 1302—1304 *Mulke* (1895—1897) in respect of a holding alleging the annual rental to be Rs. 25-2-3 as declared by the Settlement Officer; they further stated that the defendant had deposited Rs. 19-9-8 in the Court of the Sadar Munsif at Purneah alleging the annual rental to be only Rs. 4-12, and that the plaintiffs declined to accept the same.

The defendant pleaded that in a previous suit *inter partes*, decided on the 15th December 1890, the rate of rent had been found to be Rs. 4-12, and that the question of the rate of rent was therefore *res judicata*; that the settlement record relied on by the plaintiffs was made without notice to him and was not binding on him, and that he had deposited the entire rent for the period in suit. The record relied on by the plaintiffs contained the entry of Rs. 25-2-6 under the heading "Present rent according to zemindar" and the entry of Rs. 25-2-3 under the heading "Present rent as ascertained by Revenue officer:" the [337] columns headed "Present rent according to raiyat" and "Fair rent settled by Revenue officer, if any" were blank.

The Munsif who tried the suit held that the question of rate of rent was *res judicata*, and that the settlement record had been made without notice to the defendant and was not binding on him; he accordingly dismissed the suit.

On appeal, the District Judge held that as there was nothing to show that the settlement record had been finally published after the decree relied on by the defendant, the rent payable was as had been found in the decree, and he dismissed the appeal.

The plaintiffs then preferred a second appeal to the High Court, which came on for hearing before Prinsep and Hill, JJ., on the 23rd April, 1902, when their Lordships, relying on a statement made by the leading vakil for the appellants, which was not challenged by the learned vakils for the respondent, that the records of the case showed that the record of rights had been finally published on the 13th January, 1894, allowed the appeal and gave the plaintiffs a decree for rent at the rate claimed.

On the 25th August, 1902, the defendant-respondent applied for a review of this judgment on the ground that the aforesaid statement of the vakil for the appellants was incorrect, and that the records of the case contained no information as to the date of the final publication of the record of rights, and this Rule was issued on the plaintiff-appellant to show cause why the application for review of judgment should not be granted and the appeal reheard.

Babu *Saligram Singh* and Babu *Lal Mohan Ganguly* for the petitioner-respondent.

Moulvie *Mahomed Yusoof*, Babu *Pravash Chandra Mitter* and Babu *Sailendra Nath Palit*, for the plaintiffs-appellant, showed cause.

PRINSEP AND HILL, JJ. This is an application for review of our decision of the 23rd April, 1902 in second appeal No. 1133 of 1898. The ground upon which we are asked to review our judgment is that the date upon which we placed reliance [338] as being the date of the final publication of the record of rights was inaccurately stated to us by the learned vakil for the appellant, whose contention was that the record of rights of the final publication, having the effect of a decree under the Bengal Tenancy Act, superseded the decree passed in the rent suit between the parties on the 15th December, 1890. It is now obvious that the learned

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vakeel was in error in stating to us that the 13th January, 1894 was the date of final publication. That date in fact still remains undetermined, and upon that ground alone we think that this Rule ought to be made absolute, as it was undoubtedly upon the footing of the date furnished to us by the appellant's vakeel that we decided the case in his client's favour. But we desire to add that, on reference to the proceedings set forth in exhibit I in the case and printed at page 12 of the Paper Book, it appears that there was no contest whatever before the Settlement Offier in regard to the matters involved in the suit of 1890. The case therefore does not fall under section 107 of the Bengal Tenancy Act, and the effect of the decision of the Settlement Officer or rather the entry in the record of rights on which reliance was placed was not that of a decree under that section. In point of fact there was no decision of the Settlement Officer upon any contested point. That being so, the only effect that could be attached to the entries in the record would be that under section 109 of the Act there would be a presumption in favour of their accuracy until the contrary was proved. It was sufficient we think for the purposes of rebutting this presumption that the decree of 1890, which was passed in a contested suit between the parties, was put in evidence. The effect of section 109, which lays down a rule of evidence, is not in our opinion to override the rules of *res judicata*, which are of general application, and until the decree of December, 1890 was superseded by something of higher effect, it remained binding between the parties. For these reasons we think that this Rule must be made absolute, our decision of the 23rd April set aside and the appeal dismissed with costs. We also think that the opposite party should bear the costs of this Rule.

Rule absolute : appeal dismissed.

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32 C. 339 (=1 C. L. J. 43.)

[339] CIVIL RULE.

Before Mr. Justice Brett and Mr. Justice Mookerjee.

JEUN MUCHI *v.* BUDHIRAM MUCHI.*

[17th August, 1904.]

New trial, application for—Security, deposit of—Limitation—Provincial Small Cause Courts Act (IX of 1887), s. 17—Practice.

If an application under section 17 of Provincial Small Cause Courts Act (IX of 1887) is filed without security, and is subsequently completed within the time prescribed by the law of limitation for making the application, by the deposit of the decretal amount or security, the applicant has a right to have his application heard on the merits.

***Jogi Ahir* v. *Bishen Dayal Singh* (1) distinguished.**

[Ref. 14 C. L. J. 105=15 C. W. N. 993=10 I. C. 6 ; 15 I. C. 159: Fol. 43 Mad. 579.]

RULE granted to the petitioners, Jeun Muchi and others.

On the 2nd April, 1903, the Munsif of Netrokona in the exercise of his powers as a Judge of the Court of Small Causes, passed an *ex parte* decree against the petitioners, and in execution thereof the opposite party attached their moveable property on the 8th December, 1903. On the

* Civil Rule No. 2057 of 1904.

(1) (1890) I. L. R. 18 Cal. 88.