

1870

BHUBAN  
CHANDRA  
SHOME  
v.  
RAMDAYAL  
SHAMANTA.

Now, is there any thing on the record which would justify the Collector's Court in giving such a decree to the plaintiff? It would appear there is nothing. It is said that the defendant did not dispute these points; but the system of our procedure in this country is not such that if a defendant fail to dispute or contest any point, he thereby admits it. On the contrary, if the defendant fails altogether to appear and allows judgment to go by default, the plaintiff is bound to prove his case just as much as if the defendant had appeared and denied the claim.

I think, therefore, we are bound to say that the judgment of both the Courts below in this case of enhancement are not in accordance with the law. At the same time it seems to me that the defendant has been extremely remiss in failing to take this ground of objection in any stage of the proceedings below, and therefore while I think we ought to reverse the decision of the Deputy Collector and of the Judge, and to order the dismissal of the plaintiff's suit, we ought to do so without making any order as to the costs of this appeal.

GLOVER, J.—I am of the same opinion.

*Before Mr. Justice Glover and Mr. Justice Mitter.*

1870  
July 21.

RAGHUNATH SING (DEFENDANT) v. RAMKUMAR MANDAL  
(PLAINTIFF)\*

*Act VIII of 1859, ss. 2, 110—Remand—Non-appearance of Parties.*

When a suit has been remanded by the Appellate Court, and then dismissed by the Court of first instance for non-appearance of the parties, the plaintiff is not debarred thereby from bringing another suit upon the same cause of action against the same defendant.

*Baboo Nabakrishna Mookerjee* for appellant.

THE judgment of the Court was delivered by

GLOVER J.—The point taken in this special appeal is that the suit is barred by section 2, Act VIII of 1859; it being one on a cause of action which had been previously heard and determined by a Civil Court.

It appears that, on a former occasion, the plaintiff sued the defendant and got a decree in the Court of first instance. On appeal, however, to the Judge, the case was remanded; and on the remand, no one having appeared, either for the plaintiff or the defendant, the suit was dismissed on default. This is the case which is relied upon by the special appellant's pleader as barring the plaintiff's suit.

Now it is quite clear, by section 110, Act VIII of 1859, that a case dismissed under these circumstances would allow of the plaintiff's bringing a

\* Special Appeal, No. 347 of 1870 from a decree of the Second Subordinate Judge of Hooghly, dated the 16th November 1869, affirming a decree of the Moonsiff of that district, dated the 17th June 1869.

fresh suit, unless precluded by the rules for the limitation of actions, and it is not contended that the plaintiff is so precluded. Even if it be supposed, for the sake of argument, as the pleader for the special appellant has contended, that section 110 only refers to original cases, and not to cases remanded, still in no case could section 2 of the Act apply inasmuch as that section refers to causes of action which have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties. In this case it is clear that there was no case determined at all. It was simply dismissed for default of appearance of the parties.

The special appeal is dismissed, but without costs, as nobody appears for the respondent.

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RAGHUNATH  
SING  
v.  
RAMKUMAR  
MANDAL;

*Before Mr. Justice L. S. Jackson and Mr. Justice Glover.*

1870  
July 20.

RAJBALLAB SAHA (DEBTOR) v. RAMSADAY GHOSE AND OTHERS  
(DECREE-HOLDERS).\*

*Dismissal of Petition for non-appearance when no day had been fixed for hearing it—Act VIII of 1859, s. 217.*

Baboo Rama Nath Dose for the appellant.

Mr. R. E. Twidale for the respondent.

JACKSON, J.—In this case application was made to execute a decree, and notice was issued under section 216 of the Code of Civil Procedure, to the party against whom execution was applied for, to show cause why the decree should not be executed. He came and presented by his pleader a petition containing certain grounds of objection, and on that petition the Judge made the order that it was to be placed before him with the record. It does not appear that any day was fixed for hearing the petition, but on a subsequent day the Judge states that case was called on, and was repeatedly placed before him, but the pleader did not attend, and therefore the objections were disallowed.

The judgment-debtor afterwards applied to the Judge to reconsider the order, and the Judge there expressly states that the objection had been disallowed in consequence of the absence of the pleader.

It appears by an order subsequently made in the petition of the decree holder that the arrest of the judgment-debtor has been ordered in execution.

By section 217 of the Code, it is provided that “when such notice is issued “if the party shall not attend in person or by a pleader, or shall not show “sufficient cause to the satisfaction of the Court why the decree should not “be forthwith executed, the Court shall order it to be executed accordingly.

\*Miscellaneous Regular Appeal, No. 186 of 1870, from an order of the Judge of the 24-Pergunnas, dated the 2nd and 36th April 1870.