

admission by the defendant's vendor that the property in dispute had previously been conveyed by him to the plaintiff's judgment-debtor. That being so, we think it is clearly admissible in evidence against the defendant.

The objections urged before us therefore both fail, and this appeal must accordingly be dismissed with costs.

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Appeal dismissed.

C. S.

SMALL CAUSE COURT REFERENCE.

Before Sir W. Comar Petheram, Kt., Chief Justice, Mr. Justice Prinsep, and Mr. Justice Norris.

SITAL HARI BANERJEE (PLAINTIFF) v. HEERA LAL CHAT-
TERJEE (DEFENDANT).*

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January 9.

Civil Procedure Code (Act XIV of 1882), ss. 108 and 157—Ex-parte decree—Presidency Small Cause Court Act (XV of 1882), s. 37—Limitation Act (XV of 1877), Schedule II, Art. 164—New trial.

There is a distinction made by the Code of Civil Procedure between cases decided *ex-parte* in the absence of one of the parties after first hearing, and cases decided in the absence of one of the parties at an adjourned hearing.

Chapter VII of the Code relates to the appearance of parties and the consequence of their non-appearance at first hearings, whereas Chapter XIII, of which s. 157 forms a part, contains the procedure for the trial of a suit on an adjournment after the first hearing.

Where, therefore, a defendant put in an appearance in the Small Cause Court at the first hearing, and the case was adjourned to a later date for hearing, on which date the case was heard in his absence and a decree given against him, *held*, that such a decree was not one made *ex-parte* so as to enable the defendant to obtain the benefit of s. 108 of the Code, but that his only remedy was under section 37 of Act XV of 1882.

REFERENCE from the Court of Small Causes as to whether a certain decree, made on the 30th June 1893 by the Officiating Second Judge of the Small Cause Court, was an *ex-parte* decree within the meaning of section 108 of the Code of Civil Procedure,

* Reference No. 6 of 1893, made in suit No. 1654 of 1893, by E. W. Ormond, Esq., Officiating Second Judge of the Calcutta Court of Small Causes.

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 SITAL HARI admit of an application for a new trial being made at a later date
 BANERJEE than it could otherwise be made under section 37 of Act XV of
 v. HERRA LAL 1882, which prescribes eight days from the date of such decree to
 CHATTERJEE. be the limit for such an application.

It appeared that the summons in this case was returnable on the 27th April 1893, on which day both the plaintiff and defendant appeared, the defendant by his pleader recording his pleas, and the case being adjourned, at the request of the defendant, for hearing to the 23rd June, and subsequently to the 30th June. On this latter date the defendant failed to attend, and judgment was given in favour of the plaintiff.

Later on in the same day the defendant's attorney appeared and applied, under section 108 of the Civil Procedure Code, to have the decree passed in his absence set aside, on the ground that he had made a *bond fide* mistake as to the date of the hearing.

Notice being served on the plaintiff, the application came on for hearing on the 14th July, when the learned Officiating Second Judge passed an order setting aside the decree of the 30th June and granted a new trial.

On the 18th July the plaintiff applied, under section 37 of Act XV of 1882, to set aside the order of the 14th July, which application, after notice, came on for hearing before the learned Chief Judge and the Officiating Second Judges on the 9th August 1893, the Court holding that the defendant's application of the 30th June should have been rejected, on the ground that it had not been signed by the applicant, as required by section 37 of Act XV of 1882; the learned Chief Judge intimating in his judgment that the defendant's application should have been made under section 37, Act XV of 1882, and not section 108 of Act XIV of 1882, inasmuch as the defendant had entered appearance in the suit. The decree therefore passed in favour of the plaintiff on the 30th June was restored.

On the 11th August the defendant (no process for execution having issued) again applied to the learned Officiating Second Judge, under section 108 of the Code of Civil Procedure, to have the decree of the 30th June set aside and a new trial granted. On the

6th September, after hearing both sides, that learned Judge, being of opinion that the decree of the 30th June was one made *ex-parte*, granted the application, but being aware that the learned Chief Judge held a different opinion, he made his order contingent on the opinion of the High Court as to whether the decree was one made *ex-parte* within the meaning of section 108 of the Code of Civil Procedure and Article 164 of Schedule II of the Limitation Act.

The referring order concluded as follows:—"My reasons for thinking that the said decree of the 30th June is an *ex-parte* decree are as follows:—Chapter VII of the Civil Procedure Code seems to contemplate two days only, namely, the day fixed in the summons for the defendant to appear and answer and (if any) the subsequent day fixed for the hearing (see the wording of sections 96 and 101). Section 156 allows the hearing to be adjourned from time to time, and section 157 lays down the procedure to be followed on any day of the hearing when either or both parties fail to appear. Therefore sections 157 and 100 together allow the Court to proceed with the case *ex-parte* in the absence of the defendant on any day of the hearing. If this is so, the whole of the hearing of this suit being *ex-parte*, the decree must be *ex-parte*. Section 119 of Act VIII of 1859 and the case of *Zainulabdin Khan v. Ahmed Rasa Khan* (1) show that there can be *ex-parte* decrees, although the defendant may have appeared in the suit. I would also refer to the cases of *Doyal Mistree v. Kupoar Chund* (2) and *Ramtahal Ram v. Rameshar Ram* (3), and to the notes to section 109 on page 131 of Mr. Justice O’Kinealy’s Code of Civil Procedure.

Mr. Pugh for the plaintiff:—I contend that even if the decree is *ex-parte* within the meaning of section 108 of the Code, yet the application should have been made within eight days from the decree in accordance with section 37 of the Small Cause Court Act. Having regard to the manner in which portions of the Civil Procedure Code have been extended by section 23 of Act XV of 1882, I say that section 108 does not apply; and having

(1) I. L. R., 2 All., 67; L. R., 51. A., 233.

(2) I. L. R., 4 Calc., 318.

(3) I. L. R., 8 All., 140.

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regard to section 37, I contend the Limitation Act does not apply; no provision of the Civil Procedure Code would bring in by implication the Limitation Act, as is clear from section 6 of the Limitation Act. Section 37 applies to all decrees, whether *ex-parte* or not. Section 157 of Act XIV of 1882 shows the mode of procedure under Chapter VII, but under section 158 there is a special provision, as to which see *Venkatashalam v. Mahalakshamma* (1), *Shah Sahab v. Mahomed* (2). This is not an *ex-parte* decree; see *Zainulabidin Khan v. Ahmed Raza Khan* (3), and *Ramchandra Panhurang Naik v. Madhav Purushottam Naik* (4); but see *contra Dhan Bhagut v. Remessur Dutt Singh* (5).

Mr. Zorub for the defendant:—I contend that this is an *ex-parte* decree, and section 37 of Act XV of 1882 does not apply to such decrees; and that the limitation applicable is one month from the issue of process of execution. The Madras cases have no application, as they were under section 153 of the Code. Section 23 of Act XV of 1882 embodies section 108 of the Code, and therefore the Limitation Act applies. Section 108 is especially referred to in rule 44 of the Small Cause Court Practice. The Limitation Act provides a longer period for *ex-parte* decrees than for other decrees. See in the Mussul Small Cause Act and in Act X of 1877; this principle has been therefore recognised by the Legislature, and I say that it ought to be implied when construing section 37 by holding that it only applies to contested cases.

As to whether this is an *ex-parte* decree, see *Ramtahal Ram v. Rameshar Ram* (6), and *Doyal Mestree v. Kupoor Chand* (7).

This case ought not to have been referred, as the learned Judge had “no reasonable doubt” as to his decision; see section 617 of the Code.

The opinion of the Court was delivered by

PRINSEP, J. (PETHERAM, C.J., and NORRIS, J., concurring):—
This is a reference made by the Second Judge of the Small Cause

(1) I. L. R., 10 Mad., 272.

(4) I. L. R., 16 Bom., 23.

(2) I. L. R., 13 Mad., 510.

(5) 20 W. R., 53.

(3) I. L. R., 2 All., 67; L.

(6) I. L. R., 8 All., 140.

R., 5 I. A., 233.

(7) I. L. R., 4 Cal., 318.

Court of Calcutta, under section 617, Code of Civil Procedure. In a suit before that Court the defendant appeared, and on his application the trial was adjourned. It is unnecessary to describe the course of the suit further than to state that on the 30th of June, when the case was fixed for trial, the defendant did not appear, and that after witnesses had been examined on behalf of the plaintiff, the claim was decreed. The point now referred to us is whether, on the application of the defendant, this matter can be dealt with under section 108 of the Code, so as to set aside the decree passed on the 30th of June as an *ex-parte* decree and to proceed with the trial. Objection might be taken to the manner in which this reference has been made. It is sufficient to say that no objection was pressed before us, and consequently we are prepared to express our opinion on the case submitted.

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The order of the Judge was undoubtedly passed under section 157 of the Code, for, on the date to which the hearing of the suit was adjourned, the defendant "failed to appear" and "the Court proceeded to dispose of the suit in one of the modes directed on that behalf by Chapter VII of the Code," that is, by an order under section 100 giving the plaintiff a decree on the evidence tendered by him. The only question is whether, by reason of the Judge proceeding to dispose of the case under section 100, the defendant is entitled to the benefit of section 108 in the manner provided for decrees passed *ex-parte* against such a party. I am of opinion that the reference to Chapter VII, made in section 157, does not alter the character of the case so as to make an order passed in the absence of the defendant an *ex-parte* decree, and thus to enable the defendant to obtain the benefit of section 108. The reference to Chapter VII seems to me merely to indicate the procedure of the Court, and not to give a defendant the privilege to which he is entitled if the suit was decided *ex-parte* strictly within the terms of section 100. There is a distinction made by the Code between cases decided *ex-parte* in the absence of one of the parties at the first hearing and cases decided in the absence of one of the parties at an adjourned hearing. Chapter VII relates to the appearance of parties and the consequence of their non-appearance at the first hearing, whereas Chapter XIII, of which section 157 forms a part, contains the procedure for the trial of a suit on an adjournment

1894 after the first hearing. In this suit the defendant did make an appearance at the first hearing, and therefore Chapter VII would not apply, except in so far as section 157 provides that the Court may exercise a discretion in disposing of the suit as directed in Chapter VII, should the defendant fail to appear on the day to which the trial may have been adjourned. The case of *Zainulabdin Khan v. Ahmad Raza Khan* (1), decided by their Lordships of the Privy Council, points out the distinction between a case decided *ex-parte* in the absence of one of the parties at the first hearing and a case like that before us decided in the absence of a defendant on the date to which the hearing of the suit may have been adjourned. The only remedy for a defendant in such a case is, as pointed out by their Lordships, by an appeal, should an appeal lie from a decree in the suit or, it may be added, as in the present suit, where no appeal lies from a decree of the Small Cause Court of Calcutta, by an application for a new trial under section 37 of the Presidency Small Cause Court Act, 1882. I would therefore, in reply to the reference made, state that the application before the Judge under section 108 should be dismissed.

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Attorney for the plaintiff : Babu Kally Nath Mitter.

Attorneys for the defendant : Messrs. Orr, Robertson and Burton.

T. A. F.

APPELLATE CIVIL.

Before Mr. Justice Trevelyan and Mr. Justice Banerjee.

1893
Dec. 22.

BIKRAMJIT TEWARI AND ANOTHER (DEFENDANTS NOS. 4 AND 5)
v. DURGA DYAL TEWARI (PLAINTIFF) AND OTHERS (DEFENDANTS NOS. 1 TO 3).*

Interest—Interest Act XXXII of 1839—Interest on mortgage money—Transfer of Property Act (IV of 1882), s. 88—Charge on mortgaged property—Interest where none is stipulated for after due date of mortgage.

The Court has power under the Interest Act (XXXII of 1839) to give interest on mortgage money, as it is money payable at a certain time, and

* Appeal from Appellate Decree No. 727 of 1892, against the decree of J. G. Charles, Esq., District Judge of Shahabad, dated the 15th of December 1891, affirming the decree of Babu Abinash Chunder Mitter, Subordinate Judge of that district, dated the 23rd of December 1890.

(1) I. L. R., 2 All., 67 ; L. R., 5 I. A., 233.