APPELLATE CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Birch.

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BIRCHUNDER MANICKYA (PLAINTIFF) *v.* HURRISH CHUNDER DASS (DEFENDANT).*

Rent Suit—Decree obtained ex parte—Limitation—Time-expired Decree—Admissibility of, as Evidence.

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.

Such a decree is admissible as evidence even though the period for executing it has expired.

Where the plaintiff sued the defendant for a year's rent at the same rate which had been decreed to him for the previous year in a suit which he had brought against the same defendant for rent of the same property, and relied upon the former decree, which had been obtained *ex parte*, as evidence of the rent due to him from the defendant,—*held* (following *Nobo Doorga Dossee* v. *Foyz Buksh Chowdhry* (1), that the decree in the first suit determined the amount of rent due from the defendant to the plaintiff. *Held* further, that the decree was properly admissible as evidence, though the plaintiff had not taken out execution upon that decree, and his right to take out execution was barred by limitation.

Maharajah Beer Chunder Manick v. *Ramkishen Shaw* (2) explained.

THIS was a suit for rent for the year 1279 at the same rate as had been decreed to the plaintiff for the year 1278 in a suit brought with respect to the same property against the present defendant. The plaintiff relied on an *ex parte* decree which he had obtained in that suit in showing the amount of rent due to him; that decree had not been executed, and execution was admittedly barred by lapse of time. The Munsif gave the

* Appeal under s. 15 of the Letters Patent, against the decree of Mr. Justice Ainslie, dated the 15th of August, 1877, in Special Appeal No. 2936 of 1876.

(1) I. L. R., 1 Calc, 202; S. C., 24 W. R., 403.

(2) 14 B. L. R., 370; S. C., 23 W. R., 128.

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plaintiff a decree for the amount of rent named in the *ex parte* decree. On appeal the Judge reversed that decree, and held that execution of the former decree being barred, it was inadmissible in evidence to show the rate of rent due.

On special appeal (before Couch, C. J., and Ainslie, J.)—The Court differing from the decision given in *Ram Soonder Tewaree* v. *Sreenath Dewasi* (1), cited in support of the judgment given by the lower Appellate Court, referred the point to a Full Bench, who, in an opinion quoted by the Court in the present appeal, remanded the case for rehearing by the District Court. On remand this Court was of opinion that as the decree sought to be put in evidence was an *ex parte* decree, no value could be assigned to it in proof of the plaintiff's claim, and in turn remanded the case to the Munsif's Court for re-trial, with directions to ignore the said decree as an element of proof in the case. On the re-trial, the Court of first instance, on evidence taken independently of the decree, held that the plaintiff was not entitled to what it described as the enhanced rate claimed, and granted a decree for Rs. 26 13 annas. The lower Appellate Court in effect upheld the decision of the Court below, increasing, however, the sum named in the decree to 49 rupees. The defendant hereupon appealed to the High Court; the case being heard by a single Judge.

Baboo *Bharut Chunder Dutt* for the appellant.

Baboo *Kali Mohun Dass* and Baboo *Doorga Mohun Dass* for the respondent.

AINSLIE, J. (after disposing of two other grounds which had been taken and which are immaterial to this report, continued):—"It is further said that no notice of enhancement has been served upon the defendant before the institution of this suit. The Judge has, throughout his judgment, spoken of this as an enhancement suit, but it is quite clear that he is in error on this point. There was a decree for the rents of the year 1278, and in this present suit the rents of

(1) 14 B. L. R., 371 note; S. C., 10 W. R., 215.

the year 1279 are claimed at the rates mentioned in that decree. Although that decree was *ex parte*, yet it has never been set aside as fraudulently or dishonestly obtained. The fact that it was not put into execution is immaterial, the only result is that the plaintiff has lost a certain sum of money; but as far as the decree declared what was the amount payable by the defendant to the plaintiff for the year 1278, it, as admitted by the Judge, stands good. The rent for 1278 then being fixed at Rs. 74 odd annas, the claim for the same rent for the year 1279 cannot in any sense be called a suit for enhanced rent, and consequently no notice was required. Then it is said that the enhancement has been made upon wrong grounds; that the Court was bound to take into consideration the rents payable by other talookdars of similar degree in the neighbourhood, and ought not to have proceeded upon evidence as to the increased production of the land. This, however, is entirely a new point raised at the end of 4½ years' litigation, and cannot now be entertained.

"Lastly, the special appellant urges that it is not for him to prove what was the actual income, but for the plaintiff. It appears to me that the answer to that is simple. When one party has in his possession of necessity the means of proving that which is necessary to establish the affirmative or the negative of a certain issue, the burden of proof is thrown upon him.

"In cross-appeal it was urged that the Court below was wrong in not giving some weight to the decree for the year 1278, and that, if the Judge had done so, the rest of the evidence considered by the light of that decree would have been in favor of the plaintiff. On turning to the remand order in which the Judge considered the weight to be given to the previous decree, it seems to me that he there held that in the present case that decree was really of no value, because it had been given without entering into any discussion of the question now at issue and upon which evidence has been tendered on either side, and that it cannot in any way guide him to a decision on the evidence in this case. The appeal is dismissed with costs."

The plaintiff appealed from this decision under cl. 15 of the Letters Patent.

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Baboo *Kali Mohun Dass*, Baboo *Doorga Mohun Dass*, and Baboo *Bama Churn Banerjee* for the appellant.

Baboo *Hurro Mohun Chuckerbutty* for the respondent.

The judgment of the Court was delivered by

GARTH, C. J.—We think that, in this case, the lower Court is in error, through misconstruing the meaning of the Full Bench decision, *Beer Chunder Manick Bahadoor* v. *Ramkishen Shaw* (1).

The plaintiff sued the defendant for rent due for the year 1279 at the same rate which had been decreed to him for the previous year 1278, in a suit which he had brought against the same defendant for rent of the same property, and the plaintiff relied upon that former decree as almost conclusive evidence of the proper amount due to him from the defendant.

It seems that this decree for the rent of 1278 was obtained by the plaintiff *ex parte*, the defendant not appearing at the trial; and it is admitted, that no execution had ever been taken out by the plaintiff upon that decree, and that his right to take out execution had been barred by limitation.

The Court of first instance held that this former decree was evidence against the defendant in the present suit, and gave judgment for the plaintiff for the same amount, namely, Rs. 74.

The Officiating Judge on appeal reversed the Munsif's judgment, on the ground that as no steps had been taken by the plaintiff to execute the decree for the rent of 1278, and the period of limitation had been allowed to elapse, the decree itself became inoperative, and could not be kept alive for purposes of evidence any more than for purposes of execution. This view was supported by the case of *Ram Soondar Tewaree* v. *Sreenath Dewasi* (2); and when this case came up to the High Court on special appeal, the point thus decided by the Judge was referred to a Full Bench; and the Full Bench decision upon it is in the case of *Maharajah Beer Chunder Manick Bahadoor* v. *Ram-*

(1) 14 B. L. R., 370; S. C., 23 W. R., 128.

(2) 14 B. L. R., 371 note; S. C., 10 W. R., 215.

kishen Shaw (1), and is in these words :—Couch, C. J., says :— "We are of opinion that the decree is admissible in evidence. The question of its value when admitted is to be determined by the lower Courts. The defendant has alleged that it was obtained fraudulently. It does not appear that he gave any evidence of this, and it will be for the Court to say whether there is any evidence of that allegation. The decree of the Officiating Judge must be reversed, and the suit remanded to him for re-hearing."

The case then went back to the Officiating Judge, and he found, apparently upon no other grounds than that the decree had been obtained *ex parte*, and that no evidence had been given on the part of the defendant at the former trial, that the decree was of no value, and ought to be disregarded.

The case was then remanded by the lower Court to the Munsif to try the question of amount *de novo* without reference to the former decree ; and this has resulted, after a long litigation, in the plaintiff recovering Rs. 49, being a much smaller sum than was adjudged to him by the former decree.

Now in dealing with the decree in this way, we consider that the Judge was practically ignoring the true meaning of the High Court's judgment.

The High Court were perfectly aware that the former decree was made *ex parte*. They knew that the decree had passed without any evidence on the part of the defendant, and if that fact had been sufficient to invalidate the decree, or to render it of no value for the purposes of evidence in the present suit, they would of course have said so, and would not have remanded the case to the Officiating Judge for re-trial.

What the Full Bench judgment, in our view of the matter, really meant was this: that an *ex parte* decree is *primâ facie* for purposes of evidence as good as any other decree, and as binding between the parties upon the matter decided by it. But that if the defendant could show, as he said he was prepared to do, that the former decree was obtained by fraud, or that it was irregular, or contrary to natural justice, or the like, the

(1) 14 B. L. R., 370; S. C., 23 W. R., 128.

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ex parte decree, although of force between the parties in the suit in which it was given, might be properly considered as of no value for the purposes of evidence in any other suit.

It seems clear that this was the meaning of the Full Bench, because while they knew that the former decree had been obtained *ex parte,* and therefore evidently considered that fact alone as insufficient to destroy the value of the decree for purposes of evidence, they say that the defendant alleged that the decree had been obtained by fraud, and that it must be for the Court below to say whether that allegation was proved.

But when the case came again before the Officiating Judge, it does not appear that the defendant gave any evidence of fraud, or that he made any attempt to show that the decree in the former suit had been obtained otherwise than honestly and properly. The Judge pronounced the decree to be of no value as evidence, merely because it had not been contested by the defendant.

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 definitive judgment as to what is the proper amount of rent due from him to his landlord.

If a defendant does not think it worth while to contest the suit, but allows the plaintiff's evidence, and the judgment passed upon it, to go unquestioned, he has no right afterwards to dispute the correctness or the value of the judgment, merely because he chose to absent himself from the trial.

Of course if any fresh circumstances had arisen since the former decree was made, which would justify on the one hand an abatement, or on the other hand an enhancement, of the rent decreed in the former suit, the Court would be bound to take such circumstances into consideration. But no evidence of this kind was adduced by the defendant in the present case. The only materials which he brought forward, upon which the judgment of the Court below ultimately proceeded, consisted of

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evidence which the defendant might and could have brought forward, if he had so pleased, in the former suit, and which he offered no excuse for not producing on that occasion.

We think, therefore, that the principle upon which we decided the case of *Nobo Doorga Dossee* v. *Foyz Buksh Chowdhry* (1), and which has been acted upon by this Court in other cases, applies with equal force here.

We consider, for the reasons given by the learned Judge in the Court below, that no notice of enhancement was necessary before bringing this suit, and we think that the Munsif was right in the first instance in adjudging to the plaintiff the same rate of rent as was decreed to him in the former suit.

The decree will therefore be altered in that respect; but, as this long series of litigation has arisen from the misconception of the Full Bench judgment by the Officiating Judge, we think that each of the parties should pay their own costs of the proceedings subsequent to that judgment.

APPELLATE CRIMINAL.

Before Mr. Justice L. S. Jackson and Mr. Justice Cunningham.

THE EMPRESS ON THE PROSECUTION OF JOHARDI SHEIK *v.* HEMATULLA.*

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Criminal Procedure Code (Act X of 1872), s. 215—Evidence for the Prosecution—Examination of Witnesses.

A Magistrate is bound, before he discharges an accused person under s. 215 of the Criminal Procedure, to examine all the witnesses, and should not refuse to examine witnesses simply because their evidence will be to the same effect as that already taken for the prosecution.

THE complainant Johardi in this case charged another man with forcibly cutting paddy. The Deputy Magistrate to whom the case was referred took evidence as to the possession of the

* Criminal Reference, No. 1114 of 1878, from F. W. J. Rees, Esq., Offg. Magistrate of Maldah, dated the 5th of February, 1878.

(1) I. L. R., 1 Calc., 202; S. C., 24 W. R., 403.