APPELLATE CIVIL.

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

EKRAM MUNDUL AND OTHERS (DEFENDANTS) *v.* HOLODHUR PAL (PLAINTIFF).* 1878 *Jany.* 9.

Enhancement of Rent—Notice—Beng. Act VIII of 1869, *s.* 14—*Res judicata.*

A lease from generation to generation gave the boundaries of the land leased, estimated the area thereof, and fixed a certain rent per biga. It contained a condition that, if on measurement the actual quantity of land should turn out to be either more or less than the estimated area, the rent should be increased or decreased in proportion at the same rate per biga. In a suit for enhancement of rent, on the ground that the land leased contained more than the estimated number of bigas, the lease being one which did not specify the period of the engagement,—*Held*, that notice of enhancement was necessary under Beng. Act VIII of 1869, s. 14.

In a previous suit the present plaintiff had sued the defendant for the amount of rent originally fixed in the lease, and the defendant claimed in that suit to have the rent reduced in accordance with the terms of the lease, and a measurement was thereupon made, which showed that the quantity of land held by the defendant was in excess of that named in the lease: that suit was decided in favor of the plaintiff for the rent claimed. *Held*, that the measurement adopted by the Court in the former suit was not, as regards the amount of the excess, binding upon the defendant, and that, even if it were, the fact of such measurement would be no sufficient notice of enhancement to the defendant.

THE facts are sufficiently stated in the judgment appealed from, which was as follows:—

AINSLIE, J.—The defendant holds certain lands from the plaintiff under a lease from generation to generation. The lease gives the boundaries of the lands. It estimates the area to be 47 bigas 5 cottas, and fixes the rent at Rs. 59 odd annas at

* Appeal under s. 15 of the Letters Patent, against the decree of Mr. Justice Ainslie, dated the 29th of May 1877, in Special Appeal, No. 2697 of 1876, from the decree of Baboo Kristomohun Mookerjee, the Second Subordinate Judge of Nuddea, dated the 31st of August 1876, modifying the decree of Baboo Kristo Behary Mookerjee, the Munsif of Kooshtea, dated the 16th of August 1875.

1878

EKRAM MUNDUL v. HOLODHUR PAL.

the rate of Re. 1 annas 4 a biga. It contains a condition that if on measurement the actual quantity of land should turn out to be either more or less than 47 bigas 5 cottas, the rent will be increased or decreased in proportion at the same rate per biga.

The lower Appellate Court has held that in a case of this kind no notice of enhancement is required.

It appears to me that although the case does not fall strictly within the terms of s. 14 of Beng. Act VIII of 1869, a notice would, nevertheless, be necessary. The tenant is entitled to know the amount of rent demanded from him for each year at its commencement; and until measurement has been made and notice of the result of it given to him, he would be entitled under this lease to hold on from year to year at the old rent of Rs. 59 odd annas; but although it seems to me that he was entitled to a notice, I do not think that the present suit can be entirely defeated for want of notice, because it appears that in 1870 the plaintiff sued the defendant for rent at the rate originally fixed, namely, Rs. 47 annas 5. The defendant then put forward his right to have the rent reduced under the terms of the lease; and, in consequence of this plea, a measurement was made by the Court for the purposes of that suit. This in fact was a measurement which the defendant himself caused to be made after notice to the plaintiff under the conditions of the lease; and therefore, by the terms of the lease, he must be bound by the results of that measurement, and cannot claim to have a separate notice from the plaintiff after he has himself elected to put in force that condition of the lease which reserved to either party a right of measurement.

With reference to the finding of the Court in the former suit, it has been contended that it is not binding in the present case; but it seems to me that it cannot be otherwise. A question having arisen between the parties as to what would for the future be the proper rate of rent under the condition of the lease, and it having been determined, according to the terms of the lease, that a certain quantity of land was in the occupation of the defendant, and therefore that a certain rent was payable by him, it appears to me that that question was necessarily tried and determined once for all, and that neither party is at liberty to

re-open it. The case cited by the lower Appellate Court—*Nobo Doorga Dassee* v. *Foyzbux Chowdhry* (1)—appears to me to govern this case precisely.

Then there remains the question whether the plaintiff in this case is entitled to recover the excess rent for 1277 (1870). As regards four annas in respect of that year, it is perfectly clear that he cannot recover it on the ground that when he brought his former suit for the four-anna kist of 1277 he was bound to sue for the whole of the arrears then due to him; but I think that effect must be given to the first objection in respect of the other 12 annas, —that is, that there was no notice of any change of the rent until after the end of the year 1277. It appears to me that the measurement which was made in the former suit must be taken as a measurement effected on the day on which that suit was decided in the first Court, and the measurement of the ameen accepted and confirmed, which was on the 6th of Bysack 1278 (18th April 1871). Therefore, as regards the excess rents claimed for 1277 with any interest thereon, the decision of the Court below must be set aside. In respect of the remainder of the claim, the judgment of that Court is affirmed.

From this decision the defendant appealed.

Baboo *Kishori Mohun Roy* for the appellant.

Baboo *Shoshi Bhoosun Dutt* for the respondent.

The judgment of the Court was delivered by

GARTH, C. J.—We think that this appeal should be decreed. The facts of the case are correctly stated in the decision of Mr. Justice Ainslie; and we quite agree with that learned Judge, that before the plaintiff in this case (the landlord) could sue the tenant for increased rent, upon the ground that the land demised consisted of more than 47 bigas and 5 cottas, he was bound to give the defendant a previous notice that the increased rent would be required of him.

It seems to us that this notice was rendered necessary by s. 14 of Beng. Act VIII of 1869; because we have had the lease

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

1878

EKRAM MUNDUL v. HOLODHUR PAL.

in question read, and it appears to be one "not specifying the period of the engagement;" so that, until he had received such a notice as the section requires, the defendant could not be called upon to pay a higher rent than he did in the year preceding the suit. Mr. Justice Ainslie considers that the defendant was entitled in this case to some notice, though he thinks that s. 14 does not apply. But the learned Judge proceeds to say that the defendant did in fact have sufficient notice that the increased rent was payable, because in the former suit, which the plaintiff brought against the defendant for rent in the year 1870, a measurement of the demised lands was made at the instance of the defendant, the result of which was that the land was found to contain an excess of 11 bigas 16 cottas beyond the quantity mentioned in the lease.

Now, in order to see how far the defendant was bound by this measurement, and how far the fact that he knew of its being made was a sufficient notice to him to enable the plaintiff to bring this suit, we must first see what was the nature of the former suit. It was a suit by the plaintiff to recover from the defendant the rent originally fixed by the lease. The defendant pleaded that the actual quantity of land was less than that estimated in the lease, and consequently that he was entitled to an abatement. In order to ascertain the correctness of this plea, an ameen was appointed by the Court to measure the land; and the land upon measurement was found to contain more, instead of less, than the estimated quantity; the excess being 11 bigas 16 cottas. Upon this the plaintiff obtained a decree, not for any excess rent, but for the original rent for which he had brought his suit, the Judge holding very properly that he could not decree him a larger rent than he had claimed in his plaint. But it follows from this that the judgment in that suit, whatever the evidence of the ameen or the observations of the Judge may have been, was only conclusive between the parties upon the question whether the land demised was or was not less than, or equal to, the estimated quantity. Whether it was more than the estimated quantity, was a question immaterial to the suit, and one which from the very nature of the issue the Judge could not, and did not, decide. Perhaps the best test of this is,

that if the defendant had desired to call evidence at the trial to disprove the excess, or to appeal from the judgment, upon the ground that in fact the land did not exceed the estimated quantity, he could not have done so; that point being immaterial to the purposes of the suit.

In the case referred to by Mr. Justice Ainslie—*Nobo Doorga Dassee* v. *Foyzbux Chowdhry* (1)—the point decided in the first suit was necessary to the due determination of the issues in both suits, and therefore the judgment in the one case was held to be binding in the other. But here it is not so. We consider, therefore, that the measurement found by the ameen, and adopted by the Court in the suit of 1870, was not, as regards the excess, binding upon the defendant. But even supposing it were, we think it clear that the judgment in the former case, although known to the defendant, would not be a sufficient notice to him by the landlord under s. 14 of Beng. Act VIII of 1869. That notice is required to be in a particular form, and served a certain time before any suit can be brought for the excess rent; and the obvious intention of the legislature, as it seems to us, was, that the tenant, before he could be sued for any higher rent than he had previously paid, should have notice, not only that such rent might be demandable, but that his landlord intended to demand it.

The fact of the land having been measured and found to contain more than the estimated quantity would be no sufficient notice, in our opinion, that the landlord intended to insist upon the higher rent.

We are of opinion, therefore, that the original judgment of the Court of first instance, giving the plaintiff a decree for the original rent and rejecting the claim for the excess rent, was correct; and that all subsequent judgments should be reversed, the defendant being entitled to his costs in all the Appellate Courts, and also of the second trial before the Munsif in the Court of first instance.

Appeal allowed.

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