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peshgi lease which was subsequently granted. We have held in other cases that such a covenant only creates a personal liability as between the mortgagor and the mortgagee.

Then it is also clear, that the subsequent sale under the decree of 1873 did not put an end to the zurpeshgi lease, or affect the interests of the zurpeshgidar.

The plaintiff has, therefore, no right to sue for khas possession of the property as against the zurpeshgidar. His only course would be to bring a suit against the zurpeshgidar to have his right declared to sell the property to satisfy his mortgage-debt, so as to give the zurpeshgidar an opportunity of redeeming.

This suit is one of a totally different character. The plaintiff has all along contended that he is entitled to khas possession, and that the zurpeshgi lease is void; and we should be entirely changing the nature of his claim if we were to allow him to frame and try it on the other basis.

The judgment of the lower Court must, therefore, be reversed; and the plaintiff's suit dismissed with costs in both Courts.

Appeal allowed.

FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Pontifex, Mr. Justice Morris, Mr. Justice Mitter, and Mr. Justice Prinsep.

NIAMUT KHAN AND OTHERS (PLAINTIFFS) *v.* PHADU BULDIA (DEFENDANT).*

1880 *Sept.* 14.

Res judicata—Suit for Enhancement of Rent—Finding in Judgment not embodied in Decree—Civil Procedure Code (Act X of 1877), *s.* 13.

N. brought a suit against *P.* for enhancement of rent. *P.'s* defence was, *first*, that no notice of enhancement had been given; *secondly*, that the rent was not enhanceable, as he and his predecessors in title had held it at a fixed rent from the date of the Permanent Settlement. The suit was dismissed on the ground that no notice had been given; but the Munsif stated in his judg-

* Reference to a Full Bench in Appeal under s. 15 of the Letters Patent, from the decree of Mr. Justice Tottenham, dated 30th January 1880, made in appeal from appellate decree, No. 1082 of 1879, from the decree of A. T. Maclean, Esq., Judge of Zilla 24-Pargannas, dated 31st March 1879, reversing the decree of Baboo Okhoy Coomar Chatterjee, Second Munsif of Diamond Harbour, dated 23rd September 1878.

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ment, that he considered the rent enhanceable, because he did not believe in the genuineness of the documentary evidence produced by *P*. The decree merely ordered that the suit should be dismissed, the portion of the judgment as to the enhanceability of the rent not being embodied in the decree. *P*., therefore, had no right of appeal against that portion of the judgment. In a subsequent suit by *N*., against *P*., for enhancement of rent of the same tenure, *Held*, that, on the rule laid down by the Privy Council in *Soorjeemonee Dayee* v. *Suddanund Mohapatter* (1) and *Krishna Behari Roy* v. *Bunwari Lall Roy* (2), *P*. was precluded, by the decision in the former suit, from denying that the rent of the tenure was enhanceable, although the decision on that point was not embodied in the decree.

The material findings in each case should be embodied in the decree, and if they are not, *it is incumbent on the parties, to avoid their being bound by* decisions against which they have no right of appeal, to apply to amend the decree in accordance with the judgment.

THIS case was referred to a Full Bench by GARTH, C. J., and MITTER, J., on the 1st September 1880, with the following remarks :—

"This was a suit by a landlord to enhance the rent of a tenure after notice. The defendant's case was, that he and his predecessors in title had held the tenure at a fixed rent from the time of the Permanent Settlement, and consequently that the rent was not enhanceable. The plaintiff contended that the defendant was estopped from setting up this defence, because in a former suit, No. 1193 of 1875, between the same parties, it had been decided that the rent of the tenure was enhanceable.

"Now the facts of that previous case were these :—It was a suit like the present to enhance the rent of a tenure after notice. The defence set up to it was, *firstly*, that no notice had been given; and *secondly*, that the rent could not be enhanced for the reasons alleged in the present suit. The Munsif in that case dismissed the suit upon the ground that no notice had been given ; but he stated in his judgment that he considered the rent enhanceable, because he did not believe the potta and dakhilas produced by the defendant. The decree made in that suit, however, made no mention of this last point, but merely ordered that the suit should be dismissed with costs.

(1) 12 B. L. R., 304 ; S. C., 20 W. R., 377.

(2) I. L. R., 1 Calc., 144 ; S. C., 25 W. R., 1 ; L. R., 2 I. A., 283.

"In the present suit the Munsif considered that the former judgment operated as a *res judicata*, precluding the defendant from denying that the rent was enhanceable. The Appellate Court, however, held otherwise, and remanded the case to the Munsif to try that question. On a second appeal to this Court the only point raised was, whether the judgment in the former suit operated as a *res judicata*, and the learned Judge held that it did not.

"An appeal was then preferred to this Court under s. 15 of the Letters Patent, and we think that the question raised is one of so much difficulty and importance, that it ought to be referred to a Full Bench.

"The learned Judge of this Court decided in favor of the defendant, upon the ground that, although in the previous suit the Munsif found that the rent was enhanceable, that finding formed no part of the decree; and as the event of the suit was in favor of the defendant upon the ground that no notice had been given, the latter had no opportunity of appealing.

"On the other hand it is contended by the appellant, that whether the finding of the Munsif was appealable or not, its effect was the same as a *res judicata;* and that although no declaration of the plaintiff's right to enhance was, in fact, made in the former suit, still, as the plaintiff would have been entitled to such a declaration if he had asked for it, the mere finding of the issue in his favor was equivalent to a declaration.

"In the case of *Sheik Enaetoolla* v. *Sheik Ameer Buksh* (1), decided by Markby and Mitter, JJ., the circumstances were very similar to those of the present case; and the learned Judges there held, that the finding in the former case was conclusive, although the suit was dismissed generally, and no declaration in favor of the plaintiff's right was made. This decision appears to have been based, in great measure, upon a judgment of the Privy Council in the case of *Soorjeemonee Dayee* v. *Suddanund Mohapatter* (2); and see also *Krishna Behari Roy* v. *Bunwari Lal Roy* (3) and *Kriparam* v. *Bhagawan Dass* (4).

(1) 25 W. R., 225.

(2) 12 B. L. R., 304; S. C., 20 W. R., 377.

(3) I. L. R., 1 Calc, 144; S. C., 25 W. R., 1; L. R., 2 I. A., 283.

(4) 1 B. L. R., A. C., 68.

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"Under the provisions of the Civil Procedure Code, 1877, an appeal lies only *from the decree* of the lower Court (1) and the question seems to be whether any finding of the lower Court can be made the subject of appeal, which neither expressly nor by implication is embodied in the decree; and if the finding of that Court is not embodied in the decree, whether it can be considered as a *res judicata* in any future suit.

"The question, therefore, which we desire to refer for the opinion of the Full Bench is, whether the decision of the learned Judge of this Court should be confirmed?"

Baboo *Mohiny Mohun Roy* for the appellants.

Baboo *Kali Mohun Dass* for the respondent.

The following judgments were delivered by the Full Bench:—

GARTH, C. J. (PONTIFEX and MITTER, JJ., concurring).—We think we are bound to follow, in its integrity, the rule which has been laid down by their Lordships of the Privy Council in the cases referred to, and adopted by the Legislature of this country in the 13th section of the new Code,—namely, that when a material question has been substantially tried and decided in a former suit, and in a competent Court, it cannot be tried again in any other suit between the same parties.

The question which is raised in this suit, namely,—whether the tenure was liable to enhancement,—was undoubtedly tried and determined by the Munsif in the former suit; and although no declaration was made of the plaintiff's right in that respect, and although the decision was not embodied in the decree, so as to give the defendant a right of appealing against it, still it was a decision within the meaning of the rule laid down by the Privy Council, and we think that the defendant is bound by it.

It was argued at the bar, that where, as in this case, the decision in the former suit became immaterial for the purposes of that suit, and the defendant (as the decree was framed), had no opportunity of appealing against it, it is hard that it should be binding upon him.

(1) See *Koylash Chunder Koosari* v. *Ram Lall Nag*, *ante*, p. 206.

There is no doubt, that the application of the rule to case like the present may, occasionally, be productive of hardship; especially until the effect of the rule is more generally understood. Parties are very naturally unwilling to appeal against adverse decisions in cases where they are in the main successful, and where, for the purposes of the suit, the appeal is unnecessary But, nevertheless, they must appeal, unless they are content to be bound by those decisions. It is most important that suitors *should understand their position in that respect*; and it obviously becomes necessary, in order to give parties a proper opportunity of appealing, *that the material findings in each case should, in future, be embodied in the decree.*

Unless the finding is thus embodied in the decree, the party against whom the issue is decided will have no right to appeal against it. Appeals can only be preferred *against the decrees, not against the judgments* of the lower Courts (see ss. 540 and 584 of the Civil Procedure Code); and therefore, if a party wishes to appeal against the decision of a particular issue, which does not appear in the decree, he must first apply to the Court to amend the decree by embodying the decision in it.

This will render it necessary for the lower Courts to draw up their decrees with much greater particularity than has hitherto been observed.

The effect of our decision in this case will be, that the judgments of this Court and of the District Judge will be set aside, and the judgment of the Munsif restored. The appellant will have his costs in all the Courts.

MORRIS, J.—In my opinion this case falls within the rule laid down by the Judicial Committee of the Privy Council in the case of *Soorjeemonee Dayee* v. *Suddanund Mohapatter* (1). In their judgment in that case, their Lordships say :—

"If both parties invoked the opinion of the Court upon this question, if it was raised by the pleadings and argued, their Lordships are unable to come to the conclusion that, merely because an issue was not framed, which, strictly construed, embraced the whole of it, therefore the judgment upon it was *ultra*

(1) 12 B. L. R., 304; S. C., 20 W. R., 377.

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vires. Their Lordships are of opinion that the term 'cause of action' (s. 2, Act VIII of 1859) is to be construed with reference rather to the substance than to the form of action. But even if this interpretation were not correct, their Lordships are of opinion that this clause in the Code of Civil Procedure would by no means prevent the operation of the general law relating to *res judicata* on the principle '*nemo debet bis vexari pro eâdem causâ.*'

It is not unlikely, as has been suggested in the course of the argument, that the case before the Munsif having been dismissed, the defendant did not think it necessary to appeal against the judgment that his tenure was liable to enhancement, and was misled by the omission of that finding in the decree itself; but, to use the words of their Lordships of the Privy Council, "both parties invoked the opinion of the Court upon this question, and it was raised by the pleadings and argued." The omission of this finding in the decree is not material, because, as pointed out by Mr. Justice Markby in the case of *Sheik Enaetoolla* v. *Sheik Ameer Buksh* (1), their Lordships, when they delivered their judgment in the case of *Soorjeemonee Dayee* (2), had not the decree before them, and neither in that case, nor in another very similar case, *Krishna Behari Roy* v. *Bunwari Lal Roy* (3), did they think it necessary to have the decree before them. As a matter of fact, in neither case was the finding relied on embodied in the decree. It is true that, under s. 540 of the present Code of Civil Procedure, which corresponds with s. 23, Act XXIII of 1861 of the old Code, "unless when otherwise expressly provided in this Code, or by any other law for the time being in force, an appeal shall lie from decrees or from any part of decrees only." If, therefore, in this case the defendant desired to avoid the finding which was adverse to himself, he should have taken proper steps to have the decree amended, and so put himself in a position to appeal against it. It is a well-known practice in our Courts to give the decree, after it is drawn up and before it is signed by the Court, to the pleaders of both parties for their examination and signature. An opportunity is thus afforded them of

(1) 25 W. R., 225. (2) 12 B. L. R., 304; S. C., 20 W. R., 377.

(3) I. L. R., 1 Calc., 144; S. C., 25 W. R., 1; L. R., 2 I. A., 283.

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comparing the decree with the judgment, and of correcting the former, if necessary, where it appears to be at variance with the latter. The failure, however, on their part to avail themselves of this, and to amend the decree so as to open the door to an appeal, cannot render a finding of no effect or less binding upon the parties.

In this view, so long as the opinion of the Court has been given on a question which has been raised by the pleadings and argued, that opinion must be considered as *res judicata,* even though it may not have been embodied in the decree. I would answer the reference which has been made to this Bench accordingly.

PRINSEP, J.—I concur in the judgment delivered by Mr. Justice Morris.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Pontifex, Mr. Justice Morris, Mr. Justice Mitter, and Mr. Justice Prinsep.

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Sept. 6.

KASHIKANT BHUTTACHARJI (DEFENDANT) *v.* ROHINIKANT BHUTTACHARJI AND OTHERS (PLAINTIFFS).*

Limitation—Suit for Arears of Rent—Beng. Act VIII of 1869.

The last day on which a suit for the recovery of arrears of rent can be instituted under s. 29, Beng. Act VIII of 1869, is the last day of the third year from the close of the year in which the rent became payable.

The word "arrear" in that section means "rent in arrear."

Woomesh Chunder Bose v. *Surjee Kanto Roy Chowdhry* (1) overruled.

THIS case was referred to a Full Bench by MORRIS and PRINSEP, JJ., with the following remarks :—

"We are called upon to decide, in this Special Appeal, whether a suit for arrears of rent of 1280, or of any portion of it, brought on the 30th Assar 1284 (corresponding with July 13, 1877) is

* Full Bench Reference in Special Appeal, No. 361 of 1879, against the decree of Baboo Nobin Chunder Ghose, First Subordinate Judge of Mymensing, dated 24th September 1878, modifying the decree of Baboo Anuntoram Ghose, Munsif of Attia, dated 31st May 1878.

(1) I. L. R., 5 Calc., 713.