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give priority to the claimant under the registered transfer, because in such a case the only basis upon which the mortgagee can rest his claim must be, not the decree, which is not evidence against the subsequent transferee, but the prior unregistered mortgage, and that by s. 50 is entitled to no priority against the subsequent registered transfer.

STEVENS, J.—I concur.

*Appeal dismissed.*

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*Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Banerjee.*

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*July 3.*

HRIDOY KRISHNA DAS AND OTHERS (DEFENDANTS) v. PRASANNA KUMARI CHOWDHURANI (PLAINTIFF) AND OTHERS (PROFORMA DEFENDANTS).*

*Evidence—Judgment not inter partes—Objection to its admissibility not taken in the First Court—Whether such an objection is allowable at a later stage of the case.*

Where no objection was taken in the Court of first instance as to the admissibility in evidence of a document, but on the contrary reference was made to it by the defendant in the written statement as affording a basis to some of the objections raised by him, *Held*, that an objection as to the admissibility or otherwise of the document in evidence in such a case should not be allowed to be taken by the defendant (appellant) on appeal.

*Miller* v. *Madho Das* (1) distinguished.

THIS appeal arose out of an action brought by the plaintiff to recover possession of certain plots of lands which were included in taluq No. 994. The allegation of the plaintiff was that an eight annas share of the taluq belonged to her deceased husband, and the *pro formâ* defendants were the owners of the remaining eight annas share of the said taluq; that her husband left a will by which he had appointed his mother an executrix, who having taken out a probate of the said will, was in possession of the property till her death; that she subsequently brought a suit against the *pro formâ*

* Appeal from Appellate Decree No. 2227 of 1898 against the decree of Babu Rajendra Coomar Bose, Subordinate Judge of 24-Pergunnahs, dated the 16th of July 1898, affirming the decree of Babu Bepin Chandra Chatterjee, Munsif of Diamond Harbour, dated the 29th of March 1898.

(1) (1896) I. L. R., 19 All., 76; L. R., 23 I. A., 106

defendants for a declaration of her title to, and recovery of, possession of various properties, amongst others an eight annas share of the taluq above named, and obtained a decree; that she was in possession of the lands in dispute and that the defendants having obtained a lease of the said lands from the *pro formâ* defendants dispossessed her. Upon these allegations the present suit was brought.

The defence *inter alia* was that the plaintiff had failed to make out a right to the land in suit; that the suit was barred by s. 43 of the Civil Procedure Code; and that the plaintiff was not entitled to get a decree for her half share without allowing compensation to the defendants for the improvement they had made to the land.

The Munsif decreed the suit awarding the plaintiff joint possession of the lands in dispute with the defendants. On appeal an objection amongst others was taken by the appellants that the judgment and decree in the previous suit were not admissible in evidence as against them, as they were not parties to that suit. The Subordinate Judge, observing that inasmuch as the documents were admitted in evidence in the lower Court without any objection, it was now too late for the appellants to raise that objection, the more so as reference to these documents was made in the written statement of the defendants (appellants), dismissed the appeal.

Against this decision the defendants appealed to the High Court.

Dr. *Ashutosh Mookerjee*, and Babu *Sarat Chunder Ghose*, for the appellants.

Babu *Lal Mohan Das* for the respondent.

Dr. *Ashutosh Mookerjee* contended that the judgment, not being *inter partes*, was not admissible in evidence as against the appellants and the mere omission to object to its admission would not make the document admissible in evidence, and he referred to the case of *Miller* v. *Madho Das* (1).

The respondent was not called upon on this point.

(1) (1896) I. L. R., 19 All., 76; L. R., 23 I. A., 106.

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1900, JULY 3. The following judgments were delivered by the High Court (MACLEAN, C.J. and BANERJEE, J):—

MACLEAN, C. J.—A variety of objections have been taken on this appeal, but most of them have been disposed of in the course of the argument. I allude to the points, that the present appellants took their lease under an authority conferred by the plaintiff's mother-in-law, a point not taken in any of the Courts below; that the appellants' possession as raiyats gave them a good title although they obtained that possession through the *pro formâ* defendants who were themselves mere trespassers; and that the present case falls within the principle of *Watson and Co.* v. *Ramchund Dutt* (1).

These points have been disposed of during the course of the argument, and it is sufficient to say that I do not think there is anything in any of them.

The only other point is as to the admissibility of the decree in the previous suit, No. 1 of 1890, though it has been suggested that if the Court decided against the present appellants they were entitled to some compensation. I do not understand the principle upon which they can be entitled to compensation or as against whom, and no authority has been referred to in support of that contention. They were trespassers upon another man's land; they knew they were trespassers, and, if foolishly they improved, as they say, the property, they cannot charge the plaintiff with the cost of these improvements.

I now come to the question of the admissibility of the decree in the previous suit. Speaking for myself, I am not satisfied as to its inadmissibility, but, any way, I think that it is too late for the appellants to raise the question. The decree in question was admitted in evidence in the lower Appellate Court, and in the first Court without objection, by the present appellants, and not only that, but as appears from paragraphs 6 and 7 of their written statement, they themselves relied upon it as part of their defence to the present suit. In the case of *Girindra Chandra* v. *Rajendra Nath* (2) we have pointed out the injustice of allowing objections,

(1) (1890) I. L. R., 18 Calc., 10; L. R., 17 I. A., 110.
(2) (1897) 1 C. W. N., 530.

such as the present, being taken at such a late stage of the proceedings. If the appellants here had in the first Court objected to the admission of this decree as evidence against them, it would have been open to the plaintiffs to have proved their title in another and very simple way. They could have put in the will and asked the Court to construe it, and the Court would, in all probability, have accepted the construction put upon it in the previous suit, No. 1 of 1890, in which the decree I have mentioned was made. That would have obviated any difficulty as to the admissibility of the decree and have been equally effective for the plaintiff's purpose. This course was not adopted because the decree was admitted without objection.

It is urged that, assuming this decree was not evidence against the appellants, no admission on their part could make it evidence. It is clearly evidence against the *pro formâ* defendants under whom the appellants claimed, and the document being evidence, at any rate, as against them, I am not satisfied that the observations of the Privy Council in the case of *Miller* v. *Madho Das* (1) would properly apply under the special circumstances of this case.

I think, therefore, that we should not be justified at this late stage in remanding the case, and allowing it to be reopened upon this point; especially as what was proved by the decree can obviously be proved in the way I have indicated. On these grounds, the appeal fails and must be dismissed with costs.

BANERJEE, J.—I agree with the learned Chief Justice in thinking that this appeal should be dismissed with costs. Upon the question of the propriety of the lower Appellate Court having used as evidence the judgment and decree in the previous suit, I think it enough to say that the appellants are precluded by the course they have adopted in this litigation from raising the objection now. For not only did they not object to the judgment and decree being admitted in evidence before the first Court, but in paragaphs 6 and 7 of their written statement they sought to make use of the decree in question as the basis of two of their objections to the present suit; and having done that, they could not be heard to say that the Court of first instance was wrong in using the judgment

(1) (1896) I. L. R., 19 All., 76; L. R., 23 I. A., 106.

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and decree as evidence against them. This case is clearly distinguishable from the case of *Miller* v. *Madho Das* (1) upon which reliance was placed by the learned Vakil for the appellant, because all that happened in that case was, that there was an erroneous omission to object before the Courts below to the admission of evidence that was not relevant, and their Lordships of the Privy Council held that that was not enough to make irrelevant evidence relevant. Here, as I have stated above, there was not merely an omission to object to the documents to which exception is now taken, but there was a reference to those very documents as affording a basis for two of the objections raised by the defendants appellants to the present suit. That being so, it must be held that they are precluded from raising the objection now.

S. C. G. *Appeal dismissed.*

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*Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Banerjee and Mr. Justice Harington.*

1900 *July* 4.

SHAMA PROSUNNO BOSE MOZUMDAR AND ANOTHER (1ST PARTY) *v.* BRAKODA SUNDARI DASI (2ND PARTY).*

*Land Acquisition Act (X of 1870)—Apportionment of compensation money principle of—Landlord and Tenant.*

In apportioning compensation money between a landlord and a tenant, the principle to be followed is to ascertain first the amount of rent payable to the landlord and capitalize that rent at so many years' purchase, then to put a money value upon the chance (if there be any) of an enhancement of the then existing rent. These two sums the landlord is entitled to get, and the tenant is entitled to get the balance.

THIS appeal arose out of a reference made under s. 18 of the Land Acquisition Act to the District Judge of Faridpore. A plot of land was acquired by the Eastern Bengal State Railway Co., and a sum of Rs. 600 was awarded as compensation for the acquisition of the said land. The Land Acquisition Deputy Collector apportioned the said sum between the landlord and the tenant, allowing the former a six annas share and the latter a ten annas

* Appeal from Original Decree No. 158 of 1899 against the decree of B. C. Mitter, Esq., Officiating District Judge of Faridpore, dated the 7th of February 1899.

(1) (1896) L. R., 23 I. A., 106.