LETTERS PATENT APPEAL.

Before Jenkins C.J. and Woodroffe J.

1915

March 31.

AHID KHONDKAR

v.

MAHENDRA LAL DE.*

Review—Application for review on ground of discovery of new matter or evidence—Appeal—"Strict proof," meaning of—Civil Procedure Code (Act XIV of 1882) ss. 626 cl. (b), 629—Civil Procedure Code (Act V of 1908) O. XLVII, rr. 4 (2) (b). 7 (1) (b).

In section 626 of the Code of 1882 "strict proof" does not mean proof that convinces the Appellate Court, but that there must be legal proof adduced before the Court that has to deal originally with the question of granting a review.

The whole scheme of the Act recognises that with proper safeguards the Court of first instance is the proper Court to determine whether or not there should be a review, but that before a review is granted those safeguards must be observed.

Per JENKINS C.J. "Proof" ordinarily has one of two meanings; either the conviction of the judicial mind on a certain fact, or the means which may help towards arriving at that conviction: the use of the word "strict" points to the second of these two meanings; and "strict proof" means anything which may serve directly or indirectly to convince a Court and has been brought before the Court in legal form and in compliance with the requirements of the law of evidence. It is formality that is prescribed and not the result that is described.

Per WOODROFFE J. Cl. (*b*) of sub-s. (*1*) of rule 7 of O. XLVII of the new Code does not refer to the weight or sufficiency of the evidence. If the legal formalities are observed it is no objection that the probative force of evidence legally taken appears to be different to the Appellate Court from what it appeared to the Court granting review.

"Strict proof" means proof according to the formalities of law. It does not refer to sufficiency of proof in securing a particular conviction.

Whether the proof is according to law or not is within the jurisdiction

* Letters Patent Appeal No. 26 of 1911, in Appeal from Appellate Decree No. 1181 of 1909.

of the Appellate Court to determine ; the question of sufficiency of evidence is for the Court admitting the review.

Gyanand Asram v. *Bepin Mohun Sen* (1), *Bhyrub Chunder Surmah Chowdhuri* v. *Madhub Chunder Surmah* (2), *Chunder Churn Auggrodany* v. *Loodunram Dey* (3), *Koleemooddeen Mundul* v. *Heerun Mundul* (4) referred to.

LETTERS Patent appeal by Ahid Khondkar and others, the principal defendants, from the judgment of N. R. Chatterjea J.

One Mahendra Lal De and others brought a suit for arrears of rent at the rate of Rs. 80 per annum in the first Court of the Munsif at Katwa against Ahid Khondkar and others. At the first trial the suit was decreed at that rate on 21st March 1907. The defendants then filed an application for review under section 623 of the Code of Civil Procedure on the ground that they could not file certain rent receipts when the case was taken up as they had forgotten that those documents had been filed in a previous suit and that they came to know of it from the cross-examination of one of the defendants in this suit. The learned Munsif admitted the application for review, holding that the petitioners (*i.e.*, the defendants) had sufficient cause for not producing the documents when the case was heard and that those documents were not within their knowledge after the exercise of due diligence, and could not be produced at the time. The learned Munsif forthwith reheard the case, and, on the 27th November 1907, decreed the suit at the rate admitted by the defendants, after setting aside the former decree. The plaintiffs on appeal to the Additional Subordinate Judge of Burdwan objected to the order admitting the review and also to the decree passed after the admission of the review. The lower

(1) (1895) I. L. R. 22 Calc. 734.
(2) (1873) 11 B. L. R. (F. B.) 423 : 20 W. R. 84.
(3) (1876) 25 W. R. 324.
(4) (1875) 24 W. R. 186.

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Appellate Court by its judgment, dated 4th March 1909, held that the order of the Court of first instance admitting the review was *ultra vires* as, in its opinion, the defendants had failed to prove their allegations, of which there was not, in consequence, any strict proof as required by section 626, and revived the decree of the 21st March 1907. The defendants then preferred a second appeal to the Hon'ble High Court, which was dismissed on the 3rd January 1911 by Mr Justice N. R. Chatterjea who was of opinion that the lower Appellate Court had power to decide whether the defendants had strictly proved their allegations. The defendants, thereupon, preferred this appeal under section 15 of the Letters Patent.

Babu Jnanendra Nath Sarkar, for the appellants. The Court of first instance gave the plaintiffs a decree in full against the defendants and then modified it after granting my application for review. On appeal by plaintiffs the lower Appellate Court restored the original decision after setting aside the order passed on review. I submit this is illegal.

[JENKINS C.J. Did the lower Appellate Court proceed on the merits ?]

Yes. In this Court Mr. Justice N. R. Chatterjea has upheld the action of the lower Appellate Court. But section 629 of the old Code of Civil Procedure allows an appeal only when the review is granted, one of the grounds being that it was granted in contravention of the provisions of section 626. According to Mr. Justice N. R. Chatterjea's decision there would be an appeal in every case of review on the ground that the allegations had not been strictly proved. [Reads ss. 624, 626 and 629 and comments thereon.] In the present case the court of first instance when granting the review has acted according to the provisions of

section 626, in that it was satisfied that there was strict proof of the allegations made in the application for review and this finding was no doubt arrived at upon the evidence produced into proof of the allegations. I submit that the Appellate Court could not enter into the sufficiency of the evidence and give a different judgment, upon the same evidence, as to the question whether there was strict proof of the allegations in the petition of review. The Court of first instance believed the evidence, the Appellate Court disbelieved the same evidence and in consequence thereof the Appellate Court thought that the trial Court acted without jurisdiction in admitting the review. I submit he is wholly wrong. Further, if the Appellate Court be allowed to interfere with the sufficiency of the reason, or weight of evidence, given or attached by the trial Court then the applicant in whose favour the decree after review was passed will be deprived of the right of appeal against the original decree. If the opinion of Mr. Justice N. R. Chatterjea, be upeld it will rather impede the administration of justice and work out injustice to the party benefited by the admission of the review, as he cannot file any appeal against the first decree superseded thereby; nor could he simultaneously with the prosecution of the review proceedings go on with an appeal against the decree prior to review; and if he could, and succeeds therein he has no need to go on with the appeal.

I therefore submit that the order passed on the application for review under this section is final, in both cases when the order rejects the application or admits the application after observing the formalities enumerated in section 626; and in the present case the Court admitting the review has not acted in contravention of the requisite formalities.

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[JENKINS C.J. Does section 588 contain any provisions for an appeal from an order granting a review?]

No. But cl. (*w*) of r. 1 of O. XLIII of the new Code does.

[WOODROFFE J. What is the meaning of "strict proof"?]

The legal evidence given before the Court in support of the allegations in the application for review: see *Bhyrub Chunder Surmah Chowdhuri* v. *Madhub Chunder Surmah* (1) and *Kessowji Issur* v. The *Great Indian Peninsula Railway Co.* (2) as to s. 629. Regarding the finding of the lower Appellate Court as to want of jurisdiction of the Court of first instance, see the decision of Jenkins C.J. and Mookerjee J. in the Letters Patent Appeal of *Sheikh Sadaruddin* v. *Sheikh Ekramuddin* (3). If the Court of first instance had no jurisdiction, the plaintiff instead of appealing to the lower Appellate Court, should have come direct to the High Court under section 115 of the Code.

Babu Siva Prasanna Bhattacharji, for the respondent. When there is an appeal provided by section 629, the Appellate Court has power to enter into the merits of the order or judgment granting the review, and has power to form any opinion or come to any conclusion as to whether there was strict proof of the allegations made in the application for review according to its own view. I submit that the ruling in *Bhyrub Chunder Surmah Chowdhuri* v. *Madhub Chunder Surmah*(1) is in my favour, because it directs that there should be an enquiry into and strict proof of the allegations. The Appellate Court is therefore

(1) (1873) 11 B. L. R. (F. B.) 423; 20 W. R. 84. (2) (1907) I. L. R. 31 Bom. 381; L. R. 34 I. A. 115.
(3) (1913) 18 C. W. N. 22, 24.

the proper Court to decide on appeal whether there was any such strict proof or not.

[JENKINS C.J. What is the meaning of the word "proof"?]

"Proof" means the evidence that induces the Court to form a conviction as to any matter.

The appellant was not called upon to reply.

JENKINS C.J. This is an appeal under the Letters Patent from a judgment of Mr. Justice Nalini Ranjan Chatterjea, before whom the case came by way of appeal from an appellate decree. The question that arises is as to the competence of an Appellate Court to question the propriety of a review granted by the Court of first instance, on the ground that the evidence in support of the application should not have been believed.

This suit is one for rent, and in the first instance it was decided adversely to the defendants' contention. The defendants as a result of what appeared in the course of the trial, became aware of some new and important matter or evidence, and as a result of that made an application to the Court of first instance for a review. The review was granted. It was granted because it appeared to the Court that there was strict proof of the allegation of the discovery of new and important matter or evidence not within the knowledge of the applicant and because that strict proof convinced the Court of first instance. The result was that the review having been granted, the case was re-heard and a decree passed favourable to the defendants. From that decree an appeal was preferred by the plaintiffs, who objected not only on the merits, but on the ground that the review should not have been granted. The lower Appellate Court has dealt with the second of these contentions and has held that the

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review was *ultra vires* or beyond the jurisdiction of the Court of first instance, so that the first decree was restored. The position of the defendants became this: that the decree in their favour was set aside and the first decree stood without their having any right to appeal therefrom. From this decree of the lower Appellate Court there was an appeal to this Court which was heard by Mr. Justice Nalini Ranjan Chatterjea to whom it appeared that the decision of the lower Appellate Court was correct: and it is in these circumstances that the matter now comes before us by way of appeal under the Letters Patent.

The propriety of the course adopted by the learned Judge of first instance in granting the application for review, is to be determined by reference to the provisions of the old Code, which are substantially reproduced, though with a slight variation in the present Code. Section 623 permits an application for a review of a judgment and provides that it may be made by any person considering himself aggrieved who from the discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made desires to obtain a review of the decree passed or order made against him. It is only with that part of the section that we are now concerned. Section 624 provides that "except upon the grounds of the discovery of such new and important matter or evidence as aforesaid or of some clerical error apparent on the face of the decree, no application for a review of judgment other than that of a High Court shall be made to any Judge other than the Judge who delivered it." Section 626 provides that "if it appears to the Court that there is not sufficient ground for a review, it shall reject the application. If the Court be of opinion

that the application for the review should be granted it shall grant the same, and the Judge shall record with his own hand his reasons for such opinion: Provided (*a*) no such application shall be granted without previous notice to the opposite party to enable him to appear and be heard in support of the decree a review for which is applied for; and (*b*) no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge or could not be adduced by him, when the decree or order was passed, without strict proof of such allegation; and (*c*) an application made under section 624 to the Judge who delivered the judgment may, if that Judge has ordered notice to issue under proviso (*a*) to this section, be disposed of by his successor." It is only necessary now to refer to section 629, which provides that "an order of the Court rejecting the application shall be final; but whenever such application is admitted the admission may be objected to on the ground that it was—(*a*) in contravention of the provisions of section 624, (*b*) in contravention of the provisions of section 626, or (*c*) after the expiration of the period of limitation prescribed therefor and without sufficient cause. Such objection may be made at once by an appeal against the order granting the application or may be taken in any appeal against the final decree or order made in the suit." No provision is made in section 588 of the old Code for an appeal from order in the case of an order granting a review; and the power to appeal such as it is rests on section 629 alone. It is in that respect that there is a slight difference between the old and the present Code.

The view taken by Mr. Justice Chatterjea in affirming the lower Appellate Court is that "strict proof" means proof that convinced the lower Appellate Court,

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and it is on that ground, and on that ground alone, that the result can be affirmed. In my opinion, this is not the true view of the provisions of this chapter relating to review of judgments. The word "proof" ordinarily has one of two meanings: either the conviction of the judicial mind on a certain fact, or the means which may help towards arriving at that conviction. The use of the word "strict" seems to me to point to the second of these two meanings, and "strict proof," in my opinion, means anything which may serve directly or indirectly to convince a Court and has been brought before the Court in legal form and in compliance with the requirements of the law of evidence. It is formality which is prescribed and not the result that is described. This, I think, is apparent from the whole scheme of this chapter on review. For instance, we find on one side that the rejection of an application for a review is final. There is no enquiry into the merits. On the other hand, we find that the granting of a review is not final; and, as I read the chapter, it means this, that when a review is granted certain formalities have to be observed—formalities designed to secure that the applications for review should not be too readily and thus improperly granted. An examination of section 629 appears to me to support that view. It limits the grounds on which objections may be taken to the admission of a review; and the first ground described shows that an objection may be taken when the admission has been in contravention of the provisions of section 624, that is to say, it has been made to a Tribunal that has no power to grant it. Passing over for a moment section 629 (*b*) we find that another objection allowed by section 629 (*c*) is that the application is made after the expiration of the period of limitation prescribed therefor, and without sufficient cause. Then we come to the only other objection,

which is that it is in contravention of the provisions of section 626 ; and section 626, so far as it relates to this topic, requires that there should be strict proof of the allegation. That appears to me to mean that there must be proof adduced before the Court that has to deal originally with the question of granting a review. Where there has been placed before that Court such evidence or other mode of proof as the law requires and permits, I cannot think that it was intended that on appeal under section 629 it was to be open to the Appeal Court to say though there has been legal evidence, and in that sense strict proof, that proof did not convince it though it convinced the Judge who heard the witnesses, and therefore the application and the order granting the review were *ultra vires* and beyond the competence of the Court. That would bring into litigation fresh elements of chances and speculation. I think that the whole scheme of the Act recognises that with proper safeguards the Court of first instance is the proper Court to determine whether or not there should be a review, but that before a review is granted those safeguards must be observed. These safeguards have been observed in this case. I, therefore, think that the judgment of Mr. Justice Chatterjea is erroneous and must be set aside and also the decree of the lower Appellate Court. The case must therefore go back to the lower Appellate Court to be re-heard on the merits. The appellants before us are entitled to all the costs in the High Court.

WOODROFFE J. The learned Subordinate Judge has held that an Appellate Court can consider whether there was strict proof of the allegations on which an application for a review was made. Assuming for the sake of argument that this is so, a question arises—what is the meaning of strict proof? The Subordinate

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Judge was in effect of opinion that though the evidence was presented with strict formality, he could reject it as not being strict, because in his opinion it was insufficient, that is, lacking sufficient probative force in his eye to establish the allegations of the party applying for a review. I do not think this is correct. The term "strict" refers in this section, in my opinion, to formalities. Thus the section requires that formalities of law should be observed such as issue of notices, taking of evidence on oath or affirmation, legal proof of documents, cross-examination so forth. If such legal evidence be wanting objection may be made in appeal under Order XLVII, rule 7. This rule does not, I think, refer to the weight or sufficiency of the evidence. If the legal formalities are observed it is no objection that the probative force of evidence legally taken appears to be different to the Appellate Court from what it appeared to the Court granting review. In the present case the evidence was legally taken, but the Appellate Court disbelieved the evidence. The latter, after criticising the evidence, says that he disbelieves it; and because the first Court did believe it held that it was acting *ultra vires*. As an instance of the nature of the ground upon which the lower Appellate Court proceeded I may refer to the following passage in his judgment: "Then it is not at all likely that the defendants would forget all about their own rent receipts which they had filed in a previous suit regarding this very property. I therefore disbelieve their story." "Strict proof" in my opinion means proof according to the formalities of law. It does not refer to sufficiency of proof in securing a particular conviction. Thus an appeal has been allowed where the Judge has not recorded his reasons for granting an application for a review [see the case of *Gyanund*

Asram v. *Bepin Mohun Sen* (1)] or where he granted a review without enquiry or proof that the evidence was not within the knowledge of the applicant at the hearing or could not be adduced by him before the decree was passed [see the case of *Bhyrub Chunder Surmah Chowdhuri* v. *Madhub Chunder Surmah* (2)]: or where by going through the evidence a second time the Judge might come to a different conclusion [see the case of *Chunder Churn Auggrodany* v. *Loodunram Deb* (3)]; or merely to enable the case to be re-argued [see the case of *Koleemuddeen Mundul* v. *Heerun Mundul* (4)]. In all these cases there was an absence of due formalities required by law. Whether the proof is according to law or not is within the jurisdiction of the Appellate Court to determine. The question of sufficiency of evidence is for the Court admitting the review. I may add here that the result of holding otherwise would be to affirm a judgment of a Judge in whose opinion it was erroneous. I therefore agree with the order passed by the Chief Justice.

G. S. *Appeal allowed: case remanded.*

(1) (1895) I. L. R. 22 Calc. 734.
(2) (1873) 11 B. L. R. (F. B.) 423; 20 W. R. 84.
(3) (1876) 25 W. R. 324.
(4) (1875) 24 W. R. 186.