APPELLATE CIVIL.

Before Cuming and Page JJ.

1926

April 26.

BHAINRAM RATHI

v.

AMBICA CHARAN HAZRA*

Review—Review of judgment—Parties restricted to additional evidence mentioned at review—Court granting review to determine if case to be reheard partially or wholly—In absence of such direction, case to be heard de novo.

Per CUMING J. A party is confined at the re-hearing so far as additional evidence is concerned to those items of evidence which actually form the subject matter of the application for review.

Per PAGE J. A party is not necessarily restricted at the rehearing to the additional evidence upon which the review was granted.

At the time when an application for review of a judgment on the ground of the discovery of new and important evidence is before the Court, it is open to the Court under O. XLVII, r. 8, to determine whether the case shall be reheard in part or in its entirety. In the absence of any special direction in that behalf by the Court granting the review the whole case is reopened, and the Court is not restricted to a reconsideration of the particular point upon which the application for a review succeeded.

Nusseeroodeen Khan v. *Indur Narain Chowdhry* (1) and other cases referred to.

SECOND APPEAL by Bhainram Rathi, the plaintiff, against the defendant No. 1.

This appeal arose out of a suit for declaration of title and for recovery of possession of certain properties. The defendant No. 1 instituted a suit in the

*Appeal from Appellate Decree No. 356 of 1924 against the decree of G. N. Roy, District Judge of the 24-Parganas, dated Sep. 28th, 1923, confirming the decree of Upendra Nath Biswas, Subordinate Judge of Alipore, dated Sep. 14th, 1921.

(1) (1866) 5 W. R. 93.

Small Cause Court against the defendants Nos. 2 to 6 and attached the properties before judgment. The suit was decreed in favour of the defendant No. 1. Thereupon the defendant No. 1 proceeded to sell the properties in suit in execution of the decree. The plaintiff tendered a claim which was disallowed. He then brought a title suit and obtained a decree. The defendant No. 1 made an application for review of judgment on the ground of the discovery of some new and important evidence. The application was allowed, and the case was reheard and the suit was again decreed. The defendant No. 1 appealed to the District Court without success. He then appealed to the High Court.

Mr. S. C. Maity (with him *Babu Apurba Charan Mukerjee*), for the appellant, contended that the application for review having been granted, the Court hearing the case was bound to reopen the whole case and not to restrict the rehearing to any particular point, as there was no direction to that effect by the Court granting the review. That the Court below was wrong in not admitting certain documents at the retrial on the ground that they were not mentioned at the time when the review was granted.

Mr. Gunada Charan Sen (with him *Babu Kali Kinkar Chakravarti*), for the respondent, contended that when the case was reheard after a review had been granted, the Court was entitled to consider only the evidence that was before the Court at the trial and the additional evidence upon which the review was granted.

CUMING J. The facts of the case out of which this appeal arises are these. The defendant No. 1 brought a suit in the Small Cause Court against the defendants

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Nos. 2 to 6. He applied for attachment before judgment, and the properties now in suit were attached. The defendant No. 1 proceeded to sell the properties in suit in execution of the decree he obtained in his suit.

The plaintiff in this suit tendered a claim which was disallowed, and hence this suit for declaration of title and recovery of possession. The defence seems to have been that the sale to the plaintiff was a sham transaction. The Court of first instance decreed the plaintiff's suit in full on the 4th March 1919. An application for review of judgment was then made. The basis of the application was that the plaintiff was a man of straw, which fact the defendant had tried to prove in the trial. He had now discovered some new and important evidence which he could not have discovered during or before the trial.

This application was heard by another Judge, Mr. Upendra Nath Biswas, and he allowed the application for review of judgment on the 9th December 1919.

He then reheard the case, and once more the suit was decreed. The defendant No. 1 appealed to the District Court. His main contention in that Court seems to have been that the Court on review was bound to reopen the whole case. Further, that the Court hearing the case after review had been granted was bound to admit other evidence besides that on which the review had been granted. The District Court rejected the appeal, and the defendant No. 1 has appealed to this Court.

The appellant contends that the application for review having been granted the Court hearing the case was bound to reopen the whole case, and not only the points on which further evidence had been admitted.

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He contends that unless the Court granting the review restricts the review to any particular point, the Court hearing the case on review must rehear the whole case. In the present case the Judge who granted the review did not restrict the review to any particular point.

We have been taken through a number of decisions, but none of them are authorities for the proposition that the learned advocate would ask us to accept.

I will deal very briefly with some of them. *Sheikh Sadaruddin* v. *Sheikh Ekramuddin* (1). In that case it was contended that when an application for review had been granted the Court at the rehearing is restricted to the particular ground on which the review was granted. The learned Judge held that that was not so, but that the Court might either hear the case as a whole or rehear special points. This case is, therefore, only an authority for the proposition that the Court hearing the case on review may reopen the whole case.

The learned Judge referred to the case of *Bhugwandeen Doobey* v. *Myna Baee* (2) and the case of *Hurbans Sahye* v. *Thakoor Purshad* (3), where it was held that where a review had been granted on a particular ground it was open to the reviewing Court to either rehear the whole case or restrict it to any particular point as this Court thought fit.

These authorities are obviously against the appellant's contention. The next case is the case of *Gour Sundar Bhowmik* v. *Rakhal Raj Bhowmik* (4).

Mookerjee J. remarked that the view cannot be supported on principle that whenever an application for review is granted the entire case must necessarily

(1) (1913) 18 C. W. N. 22.
(2) (1867) 11 Moo. I. A. 487.
(3) (1882) I. L. R. 9 Calc. 209.
(4) (1916) 20 C. W. N. 1165.

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be reopened. The learned Judge then refers to a number of cases, and remarks :—

"These cases show that the Court may, in its discretion, direct that the "whole case be reopened, if it is necessary, in the interests of justice, that "such a course should be adopted ; but they are not authorities for the "proposition that whenever a review is granted on a particular point, the "whole case must be reopened."

The case of *Gour* v. *Nil Madhab* (1) was also referred to. It cannot be said that it in any way supports the appellant's contention.

It would be idle to refer to any further authorities. All these authorities I have been referred to are against the appellant, and he has not cited a single authority in his favour. In view of these decisions the point hardly called for any serious discussion. Probably, so far also as the present case is concerned, the point is really of academic interest, because looking at the judgment on review of the learned Judge, I am inclined to think that he actually reheard the whole case, for he does deal with some other points specifically, as for instance whether the *kabala* was executed with the intent to defraud. The evidence used in the Court of first instance was made evidence in the case, and the learned Judge concludes by saying:—

"For all these reasons, I fully agree with the judgment of my learned "predecessor on all points, who has very ably and carefully dealt with all "the questions raised in this case."

The next ground argued by the learned advocate for the appellant is that the Court below erred in not admitting certain documents at the retrial, on the ground that they were not mentioned at the time when the review was granted, and also some that were not mentioned in the application for review but were filed in Court pending the hearing of the application for the review.

(1) (1922) 36 C. L. J. 484.

It seems to me that the Judge was quite right in refusing to allow any new evidence to be adduced, except the evidence the discovery of which after the trial formed the subject-matter of the application for review.

The review is granted because this particular evidence is new and important, and was not within his knowledge at the time of trial. Until he establishes these facts, there is no ground for review, and the Court before granting the review must be satisfied on these facts. Now it is the Court granting the review which has to be satisfied, and it seems to me that it is that Court which has to determine whether any particular piece of evidence satisfies the condition of Order XLVII, rule 1. To hold after producing, say, one such piece of evidence and a review being granted on the strength of it that it is open to the party then to put in a large body of fresh evidence on the point would be most dangerous I am of opinion that a party is confined at the rehearing, so far as additional evidence is concerned, to those pieces of evidence which actually formed the subject-matter of the application for review.

To hold otherwise is to open wide the door to fraud and forgery.

No other points have been argued in the appeal There was a faint suggestion regarding section 53 of the Transfer of Property Act on the ground that the plaintiff had notice apparently of the defendant No. 1's suit. The learned advocate did not attempt to argue it, probably for the reason that it was a question of fact, and there is not the slightest indication that the point was taken in the lower Appellate Court. The appeal must be dismissed with costs.

PAGE J. I agree that the appeal should be dismissed. In this case it is not necessary to consider the

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grounds upon which a Court ought to proceed on an application for a review of judgment being preferred under Order XLVII, rule 1. For the purpose of this appeal it must be taken that the order passed by the learned Subordinate Judge of Alipore on the 9th December 1919, granting a review of the judgment of his predecessor, was duly made in accordance with law. The question that we have to determine is whether the learned Subordinate Judge, when reviewing the judgment of the 4th March 1919, was entitled to reject certain documents that were tendered by the party who had obtained the order of review, upon the ground that the documents were available to the party tendering them, and could have been produced by him at the time when the decree was passed.

Now, when the Court orders that a judgment be reviewed, the case is to be re-heard, and "re-heard "on the merits"; see Order XLVII, rule 8, and *per* Jenkins C. J. in *Vadilal* v. *Ful Chand* (1). But what is meant by a re-hearing "on the merits"? The learned advocate for the appellant contends that when a review has been granted there must be a re-hearing of the whole case *de novo*, and that the parties are entitled to adduce any evidence which is relevant to the issues raised by the pleadings. If this contention is sound the documents in question ought to have been admitted. On the other hand, the respondent contends that when a case is re-heard after a review has been granted the Court is entitled to take into consideration only the evidence that was before the Court at the trial, and the additional evidence upon which the review was granted. If that be so, the documents in suit were rightly rejected.

(1) (1905) I. L. R. 30 Bom. 56.

I have examined the Indian cases that are *ad rem*, and such English decisions on the subject of bills of review and actions of review as I have been able to discover, but I can find no direct authority upon the question that we are called upon to decide in this case. The law relating to the review of judgments may be collected from the following decisions: *Nusseerooddeen Khan* v. *Indur Narain Chowdhry* (1), *Tekaet Khood Narain Singh* v. *Toolsee Roy* (2), *Koleemooddeen Mundul* v. *Heerun Mundul* (3), *Sainal Ranchhod* v. *Dullabh Drarka* (4), *Reasut Hossein* v. *Hadjee Abdoollah* (5), *Ellem* v. *Basheer* (6), *Roy Meghraj* v. *Beejoy Gobind Burral* (7), *Hurbans Sahye* v. *Thakoor Purshad* (8), *Mahadeva Rayar* v. *Sappani* (9), *In re Appa Rao* (10), *Vadilal* v. *Fulchand* (11), *Sheik Sadaruddin* v. *Sheikh Ekramuddin* (12), *Gour Sundar Bhowmik* v. *Rakhal Raj Bhowmik* (13), *Gour* v. *Nilmadhab* (14), *Hosking* v. *Terry* (15), *Bhugwandeen Doobey* v. *Myna Baee* (16), *Cuhajju Ram* v. *Neki* (17), *Willan* v *Willan* (18), *Young* v. *Keighly* (19), *Hungate* v. *Gascoyne* (20), *Thomas* v. *Rawlings* (21), *Anderson* v. *Titmas* (22), *Boswell* v. *Coaks* (23), *Charles Bright & Co., Ltd* v. *Sellar* (24); see also

(1) (1866) 5 W. R. 93
(2) (1871) 15 W. R. 9.
(3) (1875) 24 W. R. 186.
(4) (1873) 10 Bom. H. C. R. 360.
(5) (1876) L R 3 I. A. 221.
(6) (1875) I. L. R. 1 Calc. 184.
(7) (1875) I. L. R. 1 Calc. 197.
(8) (1882) I. L R. 9 Calc 209.
(9) (1878) I. L. R. 1 Mad. 396.
(10) (1886) I. L. R. 10 Mad. 73.
(11) (1905) I. L R 30 Bom 56.
(12) (1913) 18 C. W. N. 22.
(13) (1916) 20 C. W. N. 1165.
(14) (1922) 36 C. L. J. 484.
(15) (1862) 15 Moo. P. C. 493.
(16) (1867) 11 Moo. I. A. 487.
(17) (1922) L. R. 49 I. A. 144.
(18) (1809) 16 Vesey 72.
(19) (1809) 16 Vesey 348.
(20) (1846) 2 Phillips 25.
(21) (1866) 34 Beav. 50.
(22) (1877) 36 L. T. 711.
(23) (1894) 6 R. 167.
(24) [1904] 2 K. B. 6.

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Civil Procedure Code, Order XIII, rule 2. The conclusion at which I have arrived as the result of my investigation is that at the time when an application for review of a judgment on the ground of the discovery of new and important evidence is before the Court, it is open to the Court under Order XLVII, rule 8 to determine whether the case shall be re-heard in part or in its entirety. In the absence of any special directions in that behalf by the Court granting the review, the whole case is re-opened, and the Court is not restricted to a reconsideration of the particular point upon which the application for a review succeeded.

At the re-hearing of the case the Court ought to take into consideration the evidence adduced at the trial and the additional evidence, if duly proved, upon which the review was granted, and any relevant evidence in rebuttal of such additional evidence. The Court is also entitled to admit evidence, even if it was available to the party tendering it at the time when the case was first heard, if the Court is of opinion that it was relevant to an issue raised at the trial and to be reconsidered at the re-hearing, and that the party tendering the evidence was prevented by some cause for which such party was not responsible from adducing the evidence at the trial; or if the party refrained at the trial from adducing such evidence because in the absence of the additional evidence upon which the review was granted it was not reasonable or necessary that the party should have adduced it at the trial. But the Court at the re-hearing ought not to allow a party to adduce evidence which was available, or with reasonable diligence might have been procured by such party, at the time of the trial merely in order to reinforce

at the re-hearing a case which the party raised or ought to have raised at the trial. The reason for the restriction is to prevent the fabrication of false evidence, and

"It is an invariable rule in all the Courts, and one founded upon the "clearest principles of reason and justice, that if evidence, which either "was in the possession of parties at the time of a trial, or by proper "diligence might have been obtained, is either not produced, or has "not been procured, and the case is decided adversely to the "side to which the evidence was available, no opportunity for "producing that evidence ought to be given by the granting of a new "trial. If this were permitted it is obvious that parties might endea-"vour to obtain the determination of their case upon the least amount of "evidence, reserving the right, if they failed, to have the case retried "upon additional evidence which was all the time within their power :"

per Lord Chelmsford in *Shedden* v. *Patrick* (1).

Applying the above tests to the documents in question I think that they were rightly rejected by the learned Judges in the lower Courts, and I am of opinion that the appeal fails and should be dismissed.

B. M. S. *Appeal dismissed.*

(1) (1869) L. R. 1 Scotch App. 470, 545