

1909

EMPEROR  
v.  
AHMAD  
HUSAIN  
KHAN.

constitutes good and sufficient service in law. For the reasons given I accept the recommendation of the learned Sessions Judge of Shahjahanpur and set aside the conviction and sentence passed upon Ahmad Husain Khan and acquit him; and I direct that the fine, if paid, be refunded to him.

*Conviction and sentence set aside.*

## REVISIONAL CIVIL.

*Before Mr Justice Banerji.*

AKBAR KHAN AND OTHERS (APPLICANTS) v. MUHAMMAD ALI KHAN AND OTHERS (OPPOSITE PARTIES).\*

*Civil Procedure Code (1882), sections 626, 629—Review of judgment—Rejection of application for review upon the ground of want of jurisdiction—Revision.*

Section 629 of the Code of Civil Procedure, 1882, must be read with section 626. Where the Court does not consider whether or not there are sufficient grounds for review, but rejects the application on the erroneous view that it has no jurisdiction to entertain it, the order is open to revision. *Ram Lal v. Ratan Lal* (1) distinguished. *Willis v. Jawad Husain* (2) referred to.

THE applicants in this case obtained a decree in the year 1897 for possession of certain immovable property. In 1906 they sued for possession of part of the property which had formed the subject of the former claim. On appeal the suit was dismissed on the ground that the property claimed had not been decreed to them in the former suit, and against this decision they appealed to the High Court.

Pending this appeal the applicants asked for a review of the former judgment upon the plea that both courts had intended to decree their claim in full, as prayed, but had omitted, by an oversight, a certain part thereof both from the final order in the judgment and from the decree. The Court (Additional District Judge of Meerut), without going into the merits, rejected the application for review holding that he had no jurisdiction to entertain it so long as the applicants' appeal to the High Court, in which their position was diametrically opposite to that taken by them on the review, was pending. The applicants applied in review to the High Court.

\* Civil Revision No. 7 of 1909.

(1) (1904) I. L. R., 26 All., 572.

(2) (1907) I. L. R., 29 All., 468.

1909  
July 21.

Babu *Sital Prasad Ghose* (for *Maulvi Muhammad Ishaq*), for the applicant.

Babu *Surendra Nath Sen*, for the opposite party.

BANERJI, J.—This is an application for revision of an order of the additional Judge of Meerut, refusing to entertain an application for review of judgment. The application for review was made on the ground that by an oversight the court which decided the case had omitted to insert in the final order contained in the judgment a direction for the decretal of the claim in respect of house property in *Batrara* and some other property. The decree in the case was drawn up in accordance with the judgment and omitted these two items of property. An application for review was accordingly made to the court below for the correction of the error which, it was alleged, had crept into the judgment and the decree. The learned Judge of the court below refused to entertain the application on the ground “that it cannot lie, while applicant’s appeal on exactly opposite allegations is lying in the High-Court.” It appears that in a subsequent suit the question arose, whether the plaintiff was entitled to partition of the house mentioned above. The appellate court held that having regard to the terms of the decree in the suit to which I have referred, the subsequent suit was barred by the rule of *res judicata*. Against this decree an appeal is now pending in this Court. It is to this appeal and the grounds taken in it that the learned Judge refers. The mere fact that an opposite contention was urged in an appeal in a subsequent suit, does not, in law, preclude the applicants from making an application for a review of judgment. The learned Judge, therefore, in holding that by reason of the pendency of an appeal in this Court from a decree in another suit the application for review does not lie has refused to exercise a jurisdiction vested in him by law. This is not disputed by the learned vakil for the opposite parties. But he urges, that as the Court has rejected the application for review, its order is final under section 629 of Act No. XIV of 1882, and no application for revision lies. In support of this contention he refers to the case of *Ram Lal v. Ratan Lal* (1). That case seems to me to be distinguishable. That was a case in which an

1909

AKBAR KHAN

v.

MUHAMMAD  
ALI KHAN.

1909

AKBAR KHAN  
v.  
MUHAMMAD  
ALI KHAN.

application for review had been rejected under section 626. An order rejecting an application under that section is final under section 629. Whether by the word "final" the Legislature intended to mean "non-appealable", it is not necessary to decide in this case. I am of opinion that section 629 should be read with section 626. Under the latter section, if it appears to the Court that there is no sufficient ground for review, it shall reject the application. When an application is so rejected the order of the Court is, under section 629, final. The same view appears to have been held by my brother RICHARDS, in *Willis v. Jawad Husain*(1). In this case the Court did not consider whether or not there were sufficient grounds for a review, but rejected the application, not in accordance with the provisions of section 626, but simply on the erroneous view that an application did not lie, that is to say, that the Court had no jurisdiction to entertain it. As that view is clearly wrong, I am of opinion that an application for revision can be entertained under section 622 of Act No. XIV of 1882, to which section 115 of the Code of Civil Procedure, 1908, corresponds. As, in my opinion, the Court below improperly refused to exercise jurisdiction, I allow the application, and setting aside the order of that Court, send back the case to it with directions to readmit it under its original number in the register and dispose of it on the merits. Costs will abide the event.

*Application allowed.*

## APPELLATE CIVIL.

1909  
July 26.

*Before Mr. Justice Banerji and Mr. Justice Tudball.*

BHAGWAN SAIHAI (DEPENDANT) v. NARSINGH SAIHAI (PLAINTIFF).\*

*Act No. IV of 1882 (Transfer of Property Act), section 54—Document creating an easement—Registration—Transfer of ownership—Act No. V. of 1882 (Easements Act), section 4—Right to discharge water.*

*Held* that an agreement by which the owner of a house undertook to permit the owner of an adjoining house, when he built a second storey which was in contemplation, to discharge rain water and also water used for daily household purposes on to the premises of the former, was a grant of an easement within the meaning of section 4 of the Easements Act, 1882, and did not require

\* Appeal No. 18 of 1909, under section 10 of the Letters Patent,