

1882
February 4.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

PANCHAM (DEFENDANT) v. JHINGURI AND ANOTHER (PLAINTIFFS).*

Review of judgment—To whom application may be made—Meaning of “made”—Act X of 1877 (Civil Procedure Code), ss. 623, 624.

The term “made” in s. 624 of the Civil Procedure Code does not mean “presented,” but means and includes the hearing and determination of the application for review of judgment.

Held, therefore, where an application for a review of judgment on the ground, not of the discovery of new and important matter or evidence as mentioned in s. 623 of the Civil Procedure Code, or of a clerical error apparent on the face of the decree, but on other grounds, was presented to the District Judge who delivered the judgment, and such Judge was transferred before he could entertain such application, that his successor was not competent to entertain it.

THIS was an appeal by the defendant in a suit from an order admitting a review of judgment on the ground that the admission was in contravention of the provisions of s. 624 of the Civil Procedure Code. The facts of the case are fully stated in the judgment of Straight, J.

Mr. Simeon, for the appellant

Pandit *Ajudhia Nath* and *Munshi Ram Prasad*, for the respondents.

The Court (STRAIGHT, J. and BRODHURST, J.,) delivered the following judgments:—

STRAIGHT, J.—The respondents, Jhinguri and Hanuman, having brought a suit in the Munsif’s Court to recover possession of certain land and a well, their claim was dismissed in its entirety on the 17th June, 1880. They thereupon appealed to the Judge of Allahabad, and he on the 25th September, 1880, allowed the appeal in respect of the land, but confirmed the decision of the Munsif in regard to the well. On the 4th January, 1881, the respondents Jhinguri and Hanuman made an application to Mr. Tyrrell the then Judge of Allahabad, who had determined their appeal, for a review of his judgment of the 25th September, 1880, in so far as it rejected their claim to the well, on the ground that, as he had decreed them the land in which the well was situate, it was obviously an error not to give them the well. On the 10th

* First Appeal, No. 142 of 1881, from an order of R. D. Alexander, Esq., Officiating Judge of Allahabad, dated the 6th September, 1881.

January, 1881, Mr. Tyrrell passed an order directing "issue of notice to the other side," and on the 21st the matter came on for hearing before him. Meanwhile, however, the defendant, Pancham Lal, on the 13th January, had filed a special appeal to this Court, and his pleader on the 21st January, when the application for review was to be heard, requested that it should stand over until the decision of the High Court had been given. To this suggestion Mr. Tyrrell acceded, and an order was made accordingly. Subsequently, Mr. Tyrrell was transferred to the Bench of this Court, and Mr. Alexander took the position of Officiating District Judge in his place. On the 24th June, 1881, the special appeal of Pancham, defendant, was dismissed by the High Court, and the records having been returned to the District Court, the Officiating Judge on the 29th August, 1881, proceeded to deal with the application for review filed by Jhinguri and Hanuman on the 4th January, 1881. Two objections were taken by the defendant, Pancham, to the proceedings, first, that he having appealed to the High Court against the decision of the Judge of Allahabad, the last paragraph of s. 623 of the Procedure Code was applicable, and that Jhinguri and Hanuman being respondents to such appeal should have filed objections under s. 561, instead of applying for review of judgment; second, that by s. 624 of the Procedure Code, the grounds for the review asked being other than the "discovery of new and important evidence, or clerical error apparent on the face of the record," Mr. Alexander was incompetent to entertain the application for review, he not being the Judge who had delivered the original judgment. Both these objections were overruled, and the application for review was granted. From this order Pancham now appeals to this Court, and the only plea taken in the memorandum is that the Officiating Judge acted in contravention of s. 624 of the Procedure Code and had no jurisdiction to grant the review.

The language of the section upon which the appellant relies is no doubt open to the construction his pleader places on it, and his contention is plausible enough. Reading ss. 623 and 624 together, it would appear that, while an application for review of judgment on the ground of new or important evidence, or mistake or clerical error apparent on the face of the record, may be preferred "to the

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Court which passed the decree or made the order, or to the Court, if any, to which the business of the former Court has been transferred," one which is based on "other sufficient reasons" must be made to the Judge who delivered the original judgment, the accuracy of which is impugned. It is obvious that if this latter provision is followed out strictly, not only must grave inconvenience ensue, but with the frequent changes and transfers that take place in the judicial establishment of this country, many litigants under certain circumstances would be virtually debarred from applying for a review at all. Thus if a Judge died or retired, or went on leave, or was transferred to another Court or district, before the ninety days limitation governing these applications had expired, a party seeking review for other sufficient reasons would find himself without remedy, unless it should so happen that his opponent had appealed, in which case he might prefer objections under s. 561, or as a last resource might himself prefer an appeal. But while I feel all the inconvenience and to some extent hardship that must arise from the adoption of the contention urged for the appellant, it seems to me impossible to get over the plain language of the law. The object of review is to "have a reconsideration of the same subject by the same Judge as contradistinguished to an appeal,"—*Maharajah Moheshur Singh v. The Bengal Government* (1). Look at the terms of ss. 623 and 624 which way I may, I can come to no other conclusion than that, while applications for review of judgment, when based upon the ground of discovery of new and important evidence, or on account of some mistake or error apparent on the face of the record, may be made to any Judge of the Court which passed the decree or made the order, as being matters not impeaching the essence of the original judgment, or the correctness of the decision, either in law or fact, of the Judge that passed it upon the material before him, those in which "other sufficient reasons" are alleged, attacking the accuracy of his statement of the facts, or otherwise assailing the judgment itself on points admissible in review, must be preferred to the identical Judge who delivered the judgment. I do not concur in the view of the Officiating Judge in this case that the respondents are saved from the operation of s. 624 because they "made their application" to Mr. Tyrrel;

(1) 7 Moo. I. A. 293; at p. 304.

on the 4th January, 1881. It appears to me that the word "made" must be construed to include a hearing and determination of the application for review, and to adopt any other interpretation would be to treat the provision as an absurd and useless one. Such being the views I entertain, I have no alternative but to hold that the Officiating Judge acted without jurisdiction in admitting the respondent's application for review, and that this appeal must be decreed with costs.

BRODHURST, J.—I am of opinion that the appellant's plea is valid. Under the provisions of s. 624 of Act X of 1877, the Officiating Judge, Mr. Alexander, was not, I think, competent in the present case to grant the application for review of the judgment of his predecessor Mr. Tyrrell. He could only entertain an application for review of Mr. Tyrrell's judgment on the ground of the discovery of new and important evidence, as alluded to in the preceding section, or on the ground of some clerical error apparent on the face of the decree. Reading ss. 623 and 624 of the Code together, it is I consider palpable that Mr. Alexander was precluded from referring to the record to see if his predecessor had through an oversight or otherwise committed any mistake, for the only mistake or error Mr. Alexander was, under the provisions of s. 624, empowered to notice was that mentioned above, viz., a clerical error apparent on the face of the decree. I therefore concur with my colleague Mr. Justice Straight in decreeing the appeal with costs.

Appeal allowed.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

SHEO NARAIN (PLAINTIFF) v. JAI GOBIND AND OTHERS (DEFENDANTS).*

Usufructuary mortgage—Suit to enforce hypothecation—Compensation for breach of contract—Money lent—Money had and received for plaintiff's use.

An instrument of mortgage provided that the mortgagors should deliver possession of the mortgaged property to the mortgagee, and the latter should retain possession, setting-off profits against interest, until the former should redeem, by payment of the principal sum, which they were at liberty to do in the month of Jaith in any year they pleased. The mortgagors having failed to deliver possession of the mortgaged property, the mortgagee sued them for the principal sum and

* Second Appeal, No. 738 of 1881, from a decree of M. S. Howell, Esq., Judge of Jaunpur, dated the 12th March, 1881, affirming a decree of Babu Kashi Nath Biswas, Subordinate Judge of Jaunpur, dated the 13th December, 1879.

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