1929

A. M. MALUMIAR & COMPANY v. FINLAY FLEMING & COMPANY.

CARR, J.

mark complained of had any intent to defraud. On this ground also I should acquit him.

I allow this appeal, set aside the conviction and sentence passed upon the appellant, and direct that the fine be refunded to him.

APPELLATE CIVIL.

Before Mr. Justice Brown.

1929

Feb. 6.

LAN TIN NGAN
v.
MA MYA KYIN.*

Civil Procedure Code (Act V of 1908). O. 43, r. 1 (w) ; O. 47, rr. 1, 4, 7 (1)— Appeal from order granting review limited to grounds set out in O. 47, r. 7— No appeal if Court only took wrong view of O. 43, r. 1 in granting review— Revision.

An appeal lies from an order admitting an application for review, but it is a limited right of appeal on one or other of the three grounds set out in O. 47, r. 7 (1) of the Code. O. 43, r. 1 (w) which allows the appeal, must be read with the provisions of O. 47, r. 7 (1). Where a Court hearing in mind the provisions of O. 47, r. 1 grants an application for review, it cannot be said to contravene the provisions of O. 47, r. 4, merely because it may have taken a wrong view as to the meaning of rule 1. An appellate Court would be acting without jurisdiction, if on this ground alone, it sets aside an order of the lower Court granting a review.

A.T.K.P.L.M. Muthu Pillay v. *Lakshminarayan*, 6 Ran. 254 ; *Bari Charan Saha* v. *Baran Khan*, 41 Cal. 746 ; *Sikandar Khan* v. *Baland Khan*, 8 Lah. 617—*referred to.*

P. B. Sen for the applicant.

B. K. B. Naidu for the respondent.

BROWN, J.—The petitioner Lan Tin Ngan brought a suit against the respondent as legal representative of her deceased husband Maung Po Ta for possession of certain property. The suit was dismissed by the trial Court and the petitioner then filed an application for

* Civil Revision No. 152 of 1928 from the judgment of the District Court of Tharrawaddy in Civil Appeal No. 22 of 1928.

1929

LAN TIN NGAN v. MA MYA KYIN.

BROWN, J.

review of judgment. This application was allowed by the trial Court. The respondent appealed to the District Court and that Court holding that no sufficient cause for review had been established set aside the order granting the review. The petitioner now seeks to have the District Judge's order set aside in revision and the main ground taken is that the order was passed without jurisdiction.

Under the provisions of Rule 1 (*w*) of Order XLIII of the Code of Civil Procedure an appeal lies from an order under Rule 4, Order XLVII granting an application for review. But Order XLVII, Rule 7, provides that an order granting an application may be objected to on the ground that the application was—

"(*a*) in contravention of the provisions of Rule 2,

(*b*) in contravention of the provisions of Rule 4, or

(*c*) after the expiration of the period of limitation prescribed therefor and without sufficient cause.

Such objection may be taken at once by an appeal from the order granting the application or in any appeal from the final decree or order passed or made in the suit."

It is contended on behalf of the petitioner that Order XLIII, Rule 1 (*w*), must be read with Rule 7 of Order XLVII and that an appeal against an order granting an application for review only lies on one of the grounds set forth in Rule 7. The authorities are not unanimous on this point. But with the exception of the High Court of Bombay the general consensus of opinion appears to be in favour of the view now urged on behalf of the petitioner.

A number of cases have been cited to me but the case in which the matter has been most fully discussed is perhaps the case of *Sikandar Khan and others* v.

Baland Khan and others (1). It was there pointed out that if an unrestricted right of appeal lay under Order XLIII, the provisions of Rule 7 as to the grounds on which an order granting a review could be objected to were unnecessary, and it was held that if the two Rules were read together there was no necessary inconsistency. Rule 7 lays down that the objections referred to therein may be taken either in an appeal from the order granting the application or in any appeal from the final decree or order passed or made in the suit; and the presumption to be drawn from these provisions is that the Legislature intended that in any case where such objection was not taken the order granting the review should be final. In the Code of 1882 there was no section corresponding to Rule 1 (*w*) of Order XLIII, and had the Legislature intended by the new Code of 1908 to modify the law as previously laid down in Rule 4 of Order XLVII they could easily have done so by amendment of that Rule. The earlier Rule in the present Code allows an appeal against an order granting the review but the later Rule while still allowing an appeal lays down that in that appeal certain specific grounds may be taken. It does not seem to me that there is necessarily any inconsistency between these two Rules. The restriction on the right of appeal contained in Rule 7 applies not only to an appeal from the order granting the review application but also to an appeal from the final decree or order passed or made in the suit, and the effect of the Rule is that subject to the special grounds which may be taken by way of appeal under that Rule the order granting the review application is final. The appeal which is allowed in the earlier Order XLIII must be

(1) (1927) 8 Lah. 617

1929

LAN TIN NGAN v. MA MYA KYIN.

BROWN, J.

treated as subject to this specific provision of this rule.

The same view of the law was taken by the High Court of Calcutta in the case of *Hari Charan Saha* v. *Baran Khan* (1) and a number of other authorities to the same effect are quoted in *Sikandar Khan's* case (2). The High Courts of Madras, Allahabad and Patna have decided in the same way, decision of the Bombay High Court to the contrary does not appear to have been published in the official reports of that Court. My brother Carr expressed himself in favour of this view of the law in the case of *A.T.K.P.L.M. Muthu Pillay* v. *Lakshminarayan* (3). I am of opinion that the contention of the petitioner on this point must be upheld and that, although an appeal lies against an order granting a review application, that appeal can only be entertained on one of the grounds set forth in Rule 7 of Order XLVII of the Code of Civil Procedure.

It is suggested on behalf of the respondent that even if this view of the law be accepted, nevertheless the words in Rule 7 "in contravention of the provisions of Rule 4" are sufficiently wide to cover any objection taken under the provisions of Rule 1. I find myself unable to accept this suggestion. No authority has been cited in favour of it and it appears to me to be against the clear wording of the Rule. Rule 4 (1) need not be considered; that merely deals with the rejection an application. Rule 4 (2) lays down that "where the Court is of opinion that the application for review should be granted, it shall grant the same provided that—

(*a*) no such application shall be granted without previous notice to the opposite party to enable him to appear and be heard in

(1) (1914) 41 Cal. 746. (2) (1927) 8 Lah. 617.
(3) (1928) 6 Ran. 254.

support of the decree or order, a review of 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 or made, without strict proof of such allegation.

The suggestion is that, if the High Court wrongly applies the provisions of Rule 1, the Court has acted in contravention of the provisions of Rule 4. But I am unable to see how this contention can be upheld. Under Rule 4 (2) if the Court is of opinion that the application for review should be granted, it is bound to grant the same. In deciding whether the review should be granted the Court must of course bear in mind the provisions of Rule 1. But if after bearing in mind these provisions the Court is of opinion that the application should be granted, the granting of the application is not in contravention of the provisions of Rule 4, even though the Court has taken a wrong view as to the meaning of Rule 1. There can be no doubt in the present case that the Trial Court was of opinion that the application for review should be granted. There was therefore no contravention of the first part of Clause (2) of Rule 4, and the only way in which the provisions of this Rule could have been contravened would be by contravention of the provisions specifically laid down in the proviso to the Rule. The other grounds under which objection may be taken are :—

(a) that the application was in contravention of the provisions of Rule 2,

that is to say, that if the application is made to a Judge other than the Judge who passed

1929

LAN TIN NGAN v. MA MYA KYIN.

BROWN, J.

the order sought to be reviewed, it can be made only on certain restricted grounds. The application in the present case was made to the Judge who heard the case and an objection on this ground could not have been taken; nor is there any suggestion that the application for review was made after the expiration of the period of limitation prescribed therefor. The District Judge had therefore jurisdiction to entertain the appeal only on the ground that one of the provisos to Rule 4 (2) had been contravened.

It is not suggested that proviso (*a*) has been contravened, or that the opposite party was not served with a notice of the application; nor was the application for review granted on the ground of discovery of new matter or evidence. One of the grounds on which review was asked for was that the applicant had been unable to produce a certain sale deed at the hearing, but it was not on that ground that the application was granted. The learned Judge held that he had been in error in deciding the suit without considering the admission in argument on behalf of the defendant in the case admitting that the land had been adjudged in other litigation to belong to the plaintiff. The learned Judge finally says: "A review of judgment may be granted for the ends of justice where there is an error of law on the face of the judgment, or whenever the Court considers that it is necessary to correct an evident error or omission whether on any ground urged at the original hearing of the suit or not. In the present case I do not think the applicant was given a fair chance to prove his case and in order to meet the ends of justice, I am of opinion that the application for review of the judgment should be granted." This may not have disclosed sufficient reason for granting a review under Rule 1, but it is clear that it was not on the ground

1929

LAN TIN NGAN v. MA MYA KYIN.

BROWN, J.

of discovery of new matter or evidence which the applicant alleged could not have been adduced by him when the original decree was passed that the application was allowed. The District Court set aside the order granting the review because it held that the reason for which the review was granted was not sufficient reason within the meaning of Order XLVII, Rule 1. In dealing with the appeal the Court was not considering any objection that could have been raised under the provisions of Rule 7 of Order XLVII, and the Court was therefore in my opinion acting without jurisdiction in setting aside the order granting the review.

I therefore set aside the orders of the District Court and restore those of the trial Court granting the review. The respondent Ma Mya Kyin will pay the costs of the petitioner Lan Tin Ngan in this Court and in the District Court, advocate's fee in this Court two gold mohurs.

APPELLATE CIVIL.

Before Sir Guy Rutledge, Kt., K.C., Chief Justice, and Mr. Justice Brown.

MA THEIN

v.

MA MYA AND ONE.*

1929

Feb. 13.

Buddhist Law—Remarriage of surviving parent—Rights of children other than orasa *to partition*—Kittima *children whether entitled to claim partition on remarriage of parent.*

Held, that on the remarriage of one parent after the death of the other, the *kanitha* children can sue for partition of the estate.

Held, further, that a *kittima* child can exercise the rights of a natural born child on such remarriage and claim partition.

Ma Hnin Bwin v. *U Shwe Gon*, 8 L.B.R. 1; *Ma Thin* v. *Ma Wa Yon*, 2 L.B.R. 255; *Maung Po An* v. *Ma Dwe*, 4 Ran. 184; *Maung Shwe Ywet* v. *Maung Tun Shein*, 9 L B.R. 199; *Mi The O* v. *Mi Swe*, 2 U.B.R. 46—*referred to.*

Maung Po Kin v. *Maung Tun Yin*, 4 Ran. 207—*followed.*

---

* Civil First Appeal No. 147 of 1928 from the judgment of the Original Side in Civil Regular No. 408 of 1923.