APPELLATE CIVIL.

Before Mr. Justice Dunkley.

1934

July 24.

JULI MEAH *v.* ATAR DIN.*

Review—Error apparent on the face of the record—Wrong exposition of law—Judgment based on precedent modified by subsequent decision—Omission of party to cite subsequent ruling—Civil Procedure Code (Act V of 1908), O. 47, r. 1.

A judgment is not open to review on account of some mistake or error, when the alleged mistake or error is a wrong exposition of the law, *e.g.*, when the judgment is based on a precedent which has been modified by a subsequent decision. A failure to consider a precedent bearing upon the case is not a mistake or an error apparent on the face of the record, but is really discovery of new and important matter by the party who ought to have brought this precedent to the notice of the Court, and he cannot apply for review on this ground, unless he can show that his failure to bring it to the notice of the Court was excusable.

Chhajju Ram v. *Neki*, I.L.R. 3 Lah. 127 ; *Ellem* v. *Basheer*, I.L.R. 1 Cal. 184 ; *Kotaghiri* v. *Venkatarama Rao*, I.L.R. 24 Mad. 1 ; *Roy Meghraj* v. *Beejoy*, I.L.R. 1 Cal. 197 ; *Srimati Garabini* v. *Narain Singh*, I.L.R. 3 Pat. 134—*referred to.*

Brindaban v. *Panday*, 29 C.W.N. 148—*dissented from.*

Gupta for the applicant.

Basu for the respondent.

DUNKLEY, J.—This is an application for review of my judgment passed in Special Civil Second Appeal No. 171 of 1933, in which appeal the present applicant was the respondent. At the hearing of this appeal objection was raised by learned counsel on behalf of the respondent that no second appeal lay, on the ground that the suit was a suit for a pure money claim and, therefore, was of a nature cognisable by Courts of Small Causes, within the meaning of section 102 of the Code of Civil Procedure. In reply to this argument, Mr. Basu for the appellant, who is the respondent in the present application, argued that

* Civil Misc. Application No. 55 of 1934 arising out of Special Civil Second Appeal No. 171 of 1933 of this Court.

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the suit was a suit to enforce an award, and that, therefore, in accordance with the decision in the case of *Ma Hla Gyi* v. *Maung Seik Po* (1), the facts of which were exactly the same as those of the case before me, a second appeal lay. There was no reply to this argument, and following this decision I held that a second appeal did lie ; and proceeded to deal with the appeal upon its merits, and setting aside the judgment and decree of the Assistant District Court on first appeal, restored the judgment and decree of the Township Court. I may at once say that I am still convinced that the decision of the Township Court was correct, that that of the Assistant District Court was wrong, and that, therefore, on the merits I was right in restoring the decision of the Township Court.

The ground on which this application for review is based is that it was not brought to my notice that the decision in *Ma Hla Gyi* v. *Maung Seik Po* (1) had been specifically overruled by the decision of a Bench of this Court in *Maung Ni and one* v. *Maung Aung Ba* (2), which was binding on me, and that, therefore, my judgment in the second appeal was wrong in law. It is plain that if the decision in the case of *Maung Ni and one* v. *Maung Aung Ba* (2) had been brought to my notice, as that decision was binding upon me, I should have been constrained to hold that no second appeal lay in the case before me, and consequently, should have had to dismiss the appeal instead of allowing it. I, however, absolve Mr. Basu, who appeared for the appellant-respondent in the appeal, and still appears for him in the present application, of any suggestion of deceiving me by not referring to this case, for I am quite sure that he

(1) (1923) I.L.R. 1 Ran. 700. (2) (1926) I.L.R. 4 Ran. 227.

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was just as ignorant of its existence as I was, and as learned counsel for the present applicant was. It was the duty of learned counsel for the present applicant to have brought this authority to my notice in reply to Mr. Basu's argument in the appeal, and had he done so, that would have concluded the case in his favour, but he was plainly unaware of it.

There are three cases in which alone review is permitted, namely, of new material overlooked by excusable misfortune, mistake or error apparent on the face of the record, or "any other sufficient reason." It is now contended on behalf of the present applicant that my failure to consider the Bench decision of this Court is an error apparent on the face of the record or is "other sufficient reason." It has been laid down by their Lordships of the Privy Council in *Chhajju Ram* v. *Neki and others* (1) that "other sufficient reason" means a reason sufficient on grounds analogous to the two grounds previously specified, and the argument for the applicant is that this failure to consider a ruling of this Court is either an error apparent on the face of the record or is a reason analogous to such error.

In support of his argument learned counsel for the applicant has cited the cases of *Murari Rao and others* v. *Balavanth Dikshit and another* (2) and *Brindaban Chandra Ghosh* v. *Damodor Prosad Panday* (3). In the former case a Bench of the Madras High Court held that, where a judge dismissed a suit on a wrong interpretation of the Hindu Law, that was an error apparent on the face of the record and a good ground for review, but

(1) (1922) I.L.R. 3 Lah. 127. (2) (1923) I.L.R. 46 Mad. 955.
(3) (1924) 29 C.W.N. 148.

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in the course of their judgment (at page 957) their Lordships said that this error was "so patent that we think that it can be said to be 'apparent on the face of the record'": see further on this point, *Bala Prasad* v. *Balkrishan and another* (1). In the latter case, the original decision of the Bench of the Calcutta High Court proceeded upon an interpretation of a ruling of their Lordships of the Privy Council, which interpretation was contrary to the interpretation of the same ruling adopted by their Lordships of the Privy Council themselves in another case, judgment in which was delivered after the Bench of the Calcutta High Court had delivered their judgment, and on this ground a review was allowed. The facts of the case were extremely peculiar, but in any case it appears to me, with all due respect, that the judgment of their Lordships of the Privy Council in *Kotaghiri Venkata Subbamma Rao* v. *Vellanki Venkatarama Rao* (2), where their Lordships held that review of a decree which was right when it was made is not authorized on the ground of the happening of some subsequent event, shows that the decision in *Brindaban Chandra Ghosh*'s case (3) was wrong.

The meaning of "an error apparent on the face of the record" is, to my mind, an error which can be seen by a mere perusal of the record, without reference to any other matter, and it certainly cannot be held that, on a perusal of the record of a case, the fact that the Judge had failed to refer to an authority binding upon him would be apparent. In *Chhajju Ram* v. *Neki and others* (4) their Lordships of the Privy Council laid down that the fact that a judgment proceeded upon an

(1) (1932) I.L.R. 55 All. 196, 198.
(2) (1899) I.L.R. 24 Mad. 1, 10.
(3) (1924) 29 C.W.N. 148.
(4) (1922) I.L.R. 3 Lah. 127.

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incorrect exposition of the law is no ground for review under Order 47, rule 1, of the Code of Civil Procedure. This must obviously be so, for otherwise every judgment of a Court could be called in question on the ground that the Court had wrongly laid down the law in its judgment, and there would be no finality to litigation.

In *Ellem and another* v. *Basheer and another* (1) Garth C.J. said :

> "The parties ought to come prepared with all their materials, both of law and facts, at the first hearing, and if they do not come properly prepared, they ought not to be allowed, upon discovering that they had omitted to bring forward some decided case, to try the case over again upon the strength of their own omission."

The decision in *Roy Meghraj* v. *Beejoy Gobind Burral and others* (2) is to the same effect. Both these decisions were cited with approval in *Chhajju Ram*'s case (3). In *Srimati Garabini Kamarin* v. *Suraja Narain Singh* (4) it was held that a judgment cannot be reviewed on account of some mistake or an error apparent on the face of the record, when the alleged mistake or error is a wrong exposition of the law, as, for instance, when the judgment is based on a precedent which has been modified by a subsequent decision. This decision is exactly applicable to the facts of the present case, and, with all due respect, in my opinion correctly lays down the law relating to review of judgment in regard thereto. A failure to consider a precedent bearing upon the case is not a mistake or an error apparent on the face of the record, but is really discovery of new and important matter

(1) (1875) I.L.R. 1 Cal. 184, 186.
(2) (1875) I.L.R. 1 Cal. 197.
(3) (1922) I.L.R. 3 Lah. 127.
(4) (1923) I.L.R. 3 Pat. 134.

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by the party who ought to have brought this precedent to the notice of the Court, and, therefore, he cannot apply for review of the judgment and decree on this ground unless he can show that his failure to bring it to notice was excusable.

In the present case it is not suggested that the applicant, as respondent in the second appeal, had any excuse whatever for not bringing to my notice the case of *Maung Ni and one* v. *Maung Aung Ba* (1). Consequently this application for review fails and is rejected with costs, advocate's fee five gold mohurs.

CRIMINAL REVISION.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Mya Bu.

KING-EMPEROR *v.* MAUNG PO SAW.*

1934

Dec. 19.

Summary trial—Record of evidence—Notes and memoranda of evidence not a part of the record of the case—Regular trial in Summons and Warrant cases—Criminal Procedure Code (Act V of 1898), ss. 263, 264, 355, 356, Ch. XXII.

In a summary trial under Chapter XXII of the Criminal Procedure Code, whether an appeal lies under s. 264 of the Code or no appeal lies under s. 263, in either case there is no obligation upon the magistrate or Bench of magistrates to record the evidence of the witnesses at the trial. Sections 355 and 356 of the Code apply to the evidence taken at the trial of a summons-case and a warrant-case respectively, but have no application to a summary trial. If in a summary trial a magistrate or Bench of magistrates elect to take notes or make a memorandum of the evidence such notes or memoranda form no part of the record of the case, and are not to be included either in the main file or in the process file of the record of the case.

Emperor v. *Chimanlal*, 29 Bom. L.R. 710; *Emperor* v. *Ismail*, I.L.R. 49 All. 562; *Emperor* v. *Tiwari*, I.L.R. 49 All. 261; *Madhab Chandra Saha* v. *Emperor*, I.L.R. 53 Cal. 738; *Kuchi* v. *King-Emperor*, 3 L.B.R. 3; *In re Tippanna*, 36 Bom. L.R. 212—*referred to.*

Satish Chandra Mitra v. *Manmatha Nath Mitra*, I.L.R. 48 Cal. 280—*dissented from.*

(1) (1926) I.L.R. 4 Ran. 227.

* Criminal Revision No. 949A of 1934 arising out of Criminal Summary Trial No. 21 of 1934 of the Second Class Honorary Magistrates of Yamethin.