1869
July 26.

Before Mr. Justice L. S. Jackson and Mr. Justice Markby.

BIHARI LAL NANDI AND ANOTHER (TWO OF THE DEFENDANTS) *v.* SRIMATI TRAILAKHOMAYI BARMANI (PLAINTIFF).*

Act VIII. of 1859, *ss.* 355, 376—*Review of Judgment—Omission to try a Material Issue—Reception of Evidence not Produced at the Trial.*

The omission of a Court to take into consideration a material issue is a sufficient ground to admit an application for review of judgment.

When an application for review is admitted upon other grounds, fresh evidence not produced at the trial may be received, although no reason, as required by section 376, Act VIII. of 1859, had been assigned for the non-production at the trial.

Baboo *Bama Charan Banerjee* for appellant.

Baboo *Chandra Madhab Ghose* for respondent.

MARKBY, J.—In this case the plaintiff sued to establish her right as a co-sharer in certain property. She obtained a decree in the first Court, but this decree was set aside on appeal. The plaintiff then applied for a review, on the ground that a material issue in the case had not been decided; that through inadvertence a certain document had not been brought to the notice of the Court on the argument on the appeal; and that she was now ready to produce additional evidence in support of the same issue. Notice was given to the defendant, and after hearing the parties, the Judge made the following order:

"This day the petition for review came to be argued before me. "It appears from the original judgment, that the Court did not "express any opinion on the point as to whether the sale impugned was held in a private manner as alleged by the plaintiff, or "not. This, no doubt, is a defect which ought to be rectified "by review. Again, a certain challan, which was in the record, "has not at all been noticed in the judgment. The pleader for "the plaintiff says, that it altogether escaped him to bring it to "the notice of the Court. The plaintiff has also filed copies of

* Special Appeal, No. 27 of 1869, from a decree of the Additional Subordinate Judge of East Burdwan, dated the 27th July 1868, affirming a decree of the Moonsiff of that district, dated the 28th March 1867.

1869

BIHARI LAL NANDI v. SRIMATI TRAILAKHOMAYI BARMANI

"certain other petitions with the present petition, to show that "the defendant, talookdar, was perfectly aware that she was an "8 anna co-sharer of the tenure. I think it right to ascertain the "point of fraud or no fraud with reference to the said documents. "The review is accordingly admitted to try the said two points."

When the case was heard in review, the Judge reversed his former decision, and affirmed the original decree.

From this decree the defendant has now appealed, and the first substantial objection which he has made is that the Judge was wrong in admitting the review without assigning any reason why the additional evidence was not produced at the trial.

It appears to me, however, on reading the above order, that the objects of the review was to take into consideration a material issue which the Court had omitted to consider. Why the Court had omitted to consider it, is not very clear; but I am not prepared to say that this was not a legal ground for reviewing a judgment.

It is still, however, argued that the Appellate Court had no power to admit the fresh evidence. That clearly was so under section 376, because it is admitted that no reason was assigned before the Judge on the application for review why the evidence was not produced at the trial. But there being sufficient grounds for admitting the review independently of the fresh evidence, I think the question as to the admissibility of that evidence turns on section 355. I do not think the Judge admitted the review in order to admit the fresh evidence, but having admitted the review thought it proper that the fresh evidence should be received. Section 355 provides, that the Appellate Court may admit fresh evidence, if the evidence is required to enable it to pronounce a satisfactory judgment, or for any other substantial cause. The latter part of the section says, "provided that "whenever additional evidence is admitted by an Appellate "Court, the reasons for the admission shall be recorded in the "proceedings of such Court."

The Privy Council have held, as it seems to me they must hold, that this section does not make the act of the Judge recording the reasons for receiving the evidence "a condition precedent to the reception of the evidence"—*Gunga Gobind Mundul* v. *The*

1869

BIHARI LAL NANDI v. SRIMATI TRAILAKHOMAYI BARMANI.

Collector of the 24-Pergunnas (1)—but this Court has nevertheless held in *Jugabandho Deb* v. *Golak Chandra Halder* (2) *and Joog Maya Debia* v. *Ram Chunder Chatterjee* (3), that the evidence has been improperly received, and has, on that account, set aside the decision. I imagine that these cases rest upon the ground that it was considered that in them the Judges below had never considered the matter at all with reference to the provisions of section 355, and have never decided upon that section that the evidence ought to have been received. One of them is so explained by Mr. Justice, HOBHOUSE in *Radha Nath Dhubi* v. *Ramgobind Pal* (4). I do not at all question the authority of these decisions, but I am not prepared to go to the length of saying that in this case the Judge has not considered the matter in accordance with the law. He says, he considers that it is proper to ascertain the point of fraud or no fraud with reference to the documents then produced for the first time. If it were necessary to record the reason for the reception of the new evidence, in order to render the new evidence legally admisaible, the Judge has not done so. But as it is conclusively settled that this is not necessary, then I think we have nothing before us which will justify us in saying that the Judge has acted erroneouslv. This seems to me to be in accordance with the view taken by BAYLEY and HOBHOUSE, JJ., in *Radha Nath Dhubi* v. *Ramgobind Pal* (4), in which decision I concur.

I fully accede to the necessity of a very careful exercise of the power to receive sresh evidence given by section 355, and I think it quite likely that the exercise of that power frequently leads to great injustice, as it manifestly must, unless much care be taken.

JACKSON, J.—I think his case is not free from difficulty, but on the whole I concur in the judgment proposed.

It is not so clear to me that the Subordinate Judge meant by the first part of his order to admit the review, and having done that, then by the subsequent words to make an order under section 355 to permit fresh evidence to be given. My first impression (and one which I have not quite got rid of) was that

(1) 11 Moore's I. App., 345.
(2) 10 W. R., 228.
(3) 10 W. R., 378.
(4) 3 B. L. R., A. C. 218.

1869

BIHARI LAL NANDI v. SRIMATI TRAILAKH MOYI BARMANI.

both the curious inadvertence admitted by the Subordinate Judge, and the necessity of letting in the fresh evidence, had worked upon his mind as reasons for granting the review; but either construction is possible, and, that being so, I think we ought to adopt that one which at once favours a full inquiry, and enables us to support the decision of the Court below.

I therefore concur in dismissing the appeal, but I think this is not a case in which the appellant ought to be ordered to pay costs in this Court.

Before Mr. Justice Norman and Mr. Justice E. Jackson.

UPENDRA MOHAN TAGORE AND OTHERS (PLAINTIFFS) v. THANDA DASI AND ANOTHER (DEFENDANTS.)

1869 *July* 31.

Hindu Law—Lessor and Lessee—Act X. of 1859, *s.* 27—*Division of Rent or Tenure.*

The widow of a paternal uncle is, according to Hindu law, no heir to her nephew.

The lessor is not bound to recognise the title of any one except the person with whom he deals, whatever that title may be as between the lessee and the members of his family.

Under section 27, Act X. of 1859, no division of tenure or distribution of rent is valid, or binding, without the consent in writing of the landlord.

Baboos *Srinath Das* and *Kali Prosonno Dutt* for appellants.

Baboo *Bangsi Dhar Sen* for respondents.

NORMAN, J.—This is a suit, which was brought by the late Prosonno Coomar Tagore, for possession of certain lands, held by one Haraprasad under a lease from the 30th Bhadra 1266, expiring in Baisakh 1271. The defendant is the widow of Subalram, an uncle of Haraprasad, and she claims to retain possession of the jote. The Judge finding that it is an ancestral jote, has dismissed the suit.

The facts, as appearing in the written statement of the defendant herself, are, that originally there were five brothers, Rupnarayan, Gaur Mohan, Safalram, Subalram, and Lakhan;

* Special Appeal, No. 707 of 1869, from a decree of the Officiating Judge of Rungpore, dated the 31st December 1868, affirming a decree of the Moonsiff of that district, dated the 26th October 1868.