

The judgment of the Court was delivered by
BAYLEY, J.—We think this judgment of the lower Appellate Court in this case must be reversed.

The ground pressed upon us is, that the first Court admitted a review without complying with the provisions of section 376, Act VIII of 1859, in respect of being satisfied that the new evidence, on which the application was admitted, was not within the petitioner's knowledge, or could not be adduced by him at the time when the decree was passed, and the lower Appellate Court has acted illegally in confirming the judgment of the first Court passed on that review.

The first order passed by the Moonsiff on the application for review was that it should be put up with the record. With that application no new evidence was tendered but it was subsequently. Now, no deposition or affidavit was taken from the defendant or from any one representing him or with knowledge of the facts. No enquiry was made by the Moonsiff as to whether the new evidence tendered was not available before the decision of the case. The application for review was admitted by the Moonsiff without a due regard to these provisions of the law, and the former judgment which was in favor of the special appellant reversed on such review.

The lower Appellate Court has affirmed the judgment of the Moonsiff without meeting the objection specifically taken by the special appellant,—viz., that it was requisite under the law that proof should be given that the new evidence tendered was not available before.

The following cases have been cited by the special appellant in support of his contention that the judgments of the lower Courts are erroneous in respect of the above particulars: *Shumsheir Ali Khan v. Ram Chunder Goopto* (1), *Naffar Chand Pal Chowdhry v. A. D. Sandes* (2), *Ram-dhan Chuckerbutty v. Jainarayan Panja* (3), and *Sitanath Ghose v. Shama Sundari Dasi* (4), and we think that the decisions cited support the contention.

(1) 2 W. R., 174.

(2) *Ante*, p. 35.

(3) *Ante*, p. 36.

(4) *Before Mr. Justice Bayley.*

The 6th June 1870.

SITA NATH GHOSE AND ANOTHER
 (TWO OF THE DEFENDANTS) V. SHAMA
 SUNDARI DASÍ (PLAINTIFF).*

Mr. G. C. Sonce for the petitioners.

Baboo *Debendra Chandra Ghose* for the opposite party.

BAYLEY, J.—I reject this application for review with costs.

* Application for review, No. 63 of 1870, from the Judgment of Mr. Justice Bayley and Mr. Justice Macpherson, dated the 12th February 1870, in Special Appeal No. 2799 of 1869.

1871

UMRAO
 THAKUR
 v.
 GAKUL
 MANDAL

The first ground urged is that there is an affidavit before this Court to the effect that the defendant was not aware of the existence of two documents filed in this review, viz., a petition of the Commissioner of the Soonderbuns, dated the 16th Sraban 1265, and a proceeding of that Court, dated the 25th October 1858, which would show that the chittah of 1242 relied upon by the Court below was not genuine instrument. This proceeding which, admittedly between parties other than the plaintiff and the defendant in this case, was a decision of the Commissioner of the Soonderbuns in regard to the Soonderbun and Jessore

estates, and although the affidavit is that the defendant, applicant for review

1871

UMRAO
THAKUR
v.
GAKUL
MANDAL.

No one appears on the other side to contest the special appeal, and under the circumstances, looking specially to the terms of section 376 which clearly prescribe that a party tendering new evidence as a ground of review should "shew that the new evidence was not within his knowledge or could not be adduced by him at the time when the decree was passed," and to the fact that there is no proof of the above particulars in the present case, we think that the order passed by the Moonsiff admitting the review was illegally and the decision of the lower Appellate Court confirming that order equally so. In this view we reverse the judgments of the lower Courts and decree this appeal with costs.

was not aware of its existence before, I do not think that that is a sufficient excuse, for what the law requires is not that the party was not aware of document, but that he also showed due diligence and made enquiries to ascertain its existence and found that it was not available. It is difficult to believe that by a proper search into such well known papers as the measurement papers in the office of the Commissioner of the Soonderbuns, which would naturally be the papers to be looked for in a boundry dispute like this, the party could not find the chitta out before this last stage of review.

It is then urged that a certain petition by Reazuddin was binding as an admission against the parties representing Reazuddin but no such ground was taken in the

petition of special appeal and we can, therefore, hardly be said to be wrong in law in not deciding on a point which was not put before us at all to decide, and on which we are now called to admit a review.

Lastly, we are referred to two points originally taken in the petition of special appeal, viz., that the evidence of certain witnesses had been wrongly rejected, and the whole evidence had not been duly considered by the lower Appellate Court. On these points, however, it is unnecessary to say anything more than that they are completely covered and answered by our judgment in special appeal.

The application is accordingly rejected with costs.