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DINABANDHU CHOWDHRY v. RAJMAHINI CHOWDHRAIN.

involved in this suit is said to be Rs. 46,102. The plaintiff states that his elder brother executed a will under which his widow, the defendant Rajmahini, was set aside, and the properties in dispute, moveable and immoveable, belonging to the estate of the deceased, were devised to the plaintiff. This suit is to have a summary order of this Court, dated the 13th July 1870, set aside, to have the will of his late brother declared to be genuine, and to be retained in possession of the moveable and immoveable property left by his brother.

There can be no doubt, we think, that the plaint of this description does not contemplate and expect that a Court will give consequential relief. It is a case in which if the plaintiff gets a decree, an application to execute that decree in he form of retaining the plaintiff in possession, may be made and process in executon taken out. We therefore think that the lower Court was right in rejecting the plaint as improperly stamped, and dismiss the appeal with costs.

Before Mr. Justice Bayley and Mr. Justice Ainslie.

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UMRAO THAKUR (PLAINTIFF) *v.* GAKUL MANDAL AND ANOTHER (DEFENDANTS.)*

Act VIII of 1859, *s.* 376—*Review—New Evidence—Proof of.*

A review of judgment under section 376 of Act VIII of 1859, on the ground of discovery of new evidence not within the applicant's knowledge at the hearing of the case, should not be admitted without proof of the truth of the ground alleged,

THIS was a suit to recover possession of 20 bigas of land with mesne profits or two years. The plaintiff claimed to hold under a potta from the zemindar. and alleged that the defendant had dispossessed him.

The plaintiff was absent on the day fixed for the trial of this case before the Moonsiff, but the defendant was present. The Moonsiff proceeded with the trial and gave a decree in favor of the plaintiff. The defendant subsequently applied to the Moonsiff for a review of judgment on the ground that he had discovered new evidence materially bearing on the case, which was not within his knowledge at the original hearing. The first order on this application was that it should be put up with the record, and subsequently the review was granted, without an enquiry, other than the allegations in the petition, as to the correctness of the ground advanced for the review. The Moonsiff on review cancelled his former decree and dismissed the plaintiff's suit.

The plaintiff appealed (1) urging that under section 376 of Act VIII of 1859,

(1) But see Act VIII of 1859, s. 378. "If the Court shall be of opinion that there are not any sufficient grounds for a review, it shall reject the application; but if it shall be of opinion that the review desired is necessary to correct an evident error or omission, or is otherwise requisite for the ends of justice, the Court shall grant the review; *and its order in either case, whether for rejecting the application or granting the review, shall be final.* Provided that no review of judgment shall be granted without previous notice to the opposite party, to enable him to appear and be heard in support of the decree of which a review is solicited."

*Special Appeal, No. 200 of 1871, from a decree of the Subordinate Judge of Purneah, dated the 17th January 1871, affirming a decree of the Moonsiff of that district, dated the 2nd September 1870.

the Moonsiff was wrong in admitting the review, on the ground of discovery of new evidence, without proof sufficient to satisfy him *primâ facie*, of the truth or otherwise of the allegation. The Subordinate Judge who heard the appeal was of opinion that because the Moonsiff considered the documents tendered as new evidence to be material to the defendant's case, he (the Moonsiff) was justified in admitting a review. This Court also upheld the lower Court's decision on the merits.

The plaintiff next preferred a special appeal to the High Court.

Baboo *Taraknath Sein*, for the appellant, contended that the proceeding of the Moonsiff in admitting the review on the bare allegation in the petition, unsupported by any evidence whatever, was contrary to the provisions of section 376 of Act VIII of 1859. He cited the cases of *Shumsheir Ali Khan* v. *Ramchunder Goopto* (1), *Naffar Chand Pal Chowdhry* v. *A. D. Sandees* (2),

(1) 2 W. R., 174.

(2) *Before Mr. Justice Phear and Mr. Justice Hobhouse.*

The 3rd December 1868.

NAFFAR CHAND PAL CHOWDHRY AND ANOTHER (DEFENDANTS) v. A. D. SANDES AND ANOTHER (PLAINTIFFS).*

Mr. *Vertannes* and Baboo *Srinath Das* for the appellants.

Baboo *Bhawani Charan Dutt* for the respondents.

The judgment of the Court was delivered by

PHEAR, J.—We think that the special appellant must succeed in this case on the ground, which perhaps is somewhat narrow, that the review was granted by the lower Court without there being any evidence before the Court to justify its coming to the conclusion that a review of its judgment was properly required within the provisions of section 378 of the Civil Procedure Code. We think that the Judge ought not to have admitted a review for the purpose of receiving fresh evidence in the suit, except upon being satisfied by legal evidence that the fresh evidence proposed to be adduced was not known to the applicant, or could not be obtained by him, at the time of the original trial. Had there been any evidence to this effect before the Judge, we could not here, sitting in special appeal, have interfered with his discretion as regards the conclusions which he drew from it. But it appears to us that there was in fact no evidence before him. He directed a review simply upon the statement made to him in the petition of the plaintiff, and that petition, as we understand, was not verified: it was therefore really nothing more than an unsanctioned statement. We think it right to add that even had there been some evidence before the Judge, upon which he could have legally come to the conclusion favorable to the petitioner in the matter of his petition for a review, still, to use the words of the Chief Justice in *Dwarkanath Chowdhry* v. *Kishenlall Chowdhry* (*a*) "he ought not to "have granted the application without "strict proof that the new matter was "discovered since the decree was passed." We direct that the order granting the review be set aside, and we reverse the decision which has been come to by the lower Appellate Court upon the review. The special appellant must have his costs in this Court and in the lower Court upon review.

* Special Appeal, No. 1890 of 1868, from a decree of the officiating Judge of Nuddea, dated the 26th June 1868, reversing a decree of the Subordinate Judge of that district dated the 28th April 1868.

(*a*) Marshall, 554.