

1872
 PRABANNATA
 KUMAR SAN-
 DYAL
 v.
 MATHURNATH
 BANERJEE

plaintiff had a valid cause of action, and that in seeking to set aside the potta he is removing a serious cloud to his title, and a serious impediment in the way of a full enjoyment of his property. I have already held in another case, *Fakir Chand v. Thakur Sing* (1), decided by me and Mr. Justice Macpherson on the 20th April 1871, that in cases where a serious cloud is cast upon the title of a party, he has a right to come to Court for the purpose of removing that cloud which is an impediment to the quiet and full enjoyment of his property. I would remand this case to the Judge for a trial on the merits.

Before Mr. Justice Kemp and Mr. Justice Ainslie.

DINABANDHU CHOWDHRY (PLAINTIFF) v. RAJMAHINI CHOWD-
 RAIN (DEFENDANT).*

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 Aug 21

Declaratory Decree—Suit for Confirmation of Possession on reversal of a Summary Order of a Civil Court—Valuation of Suit—Stamp—Act VII of 1870, cl. 3, art. 17 schd. 2.

The plaintiff, claiming under a will of the deceased, applied for a certificate under Act XXVII of 1860, but the High Court on appeal refused the same. He now brought a suit alleging that he was in possession of the property of deceased, and asked for "confirmation of right and possession by enforcement of the will, in reversal of the summary order of the High Court." *Held*, that clause 3, article 17 of schedule 2, of Act VII of 1870 (2), did not apply. This was not a suit to obtain a declaratory decree where no consequential relief was prayed.

This was a suit valued at Rs. 46,102-11-5½. The plaint was engrossed upon a stamp of Rs. 10. The plaint ran as follows:—

"Suit for confirmation of right and possession over the undermentioned moveable and immoveable properties, by enforcement of a will, in reversal of a summary order of the High Court. dated the 13th July, 1870, passed in a suit for certificate under Act XXVII of 1860, laid, as per schedule below, at Rs. 46,102-11-5½.

"Your petitioner's elder uterine brother, Audita Chandra Chowdhry, defendant's husband, was ailing with fever, spleen and diarrhoea, and as he did not recover, and having been on hostile terms with his brother-in-law (wife's brother) Harrónath Chowdhry, was apprehensive lest after his death his widow should come under the influence of her brother and waste the estate; and besides, as it was the custom of your petitioner's predecessors not to give liberty to women, he in accordance with the custom of our father and uncle, in sound sense, and with the knowledge of the defendant, executed a will on

(1) 7 B. L. R., A. C., 614.

(2) *Act VII of 1870 Schedule II, Art 17, cl. 3:—*"For a plaint or memorandum of appeal in which of the following suits no consequential relief is prayed, the proper fee is Rs. 10."

* * * * *

*Regular Appeal, No. 99 of 1871, from a decree of the Judge of Faridpore dated the 5th April 1871

17th Kartik 1275 (18th November 1868), reciting, amongst other things, that he appointed your petitioner executor to his own 2 annas 13 gundabs 1 cowree and 1 krant shate. He continued in possession of sound sense till the following morning, when he suddenly became insensible and died at 6 *dund* in the day. After his death your petitioner held possession of the said property left by him, and applied to the Judge of Daoca for a certificate under Act XXVII of 1860. In the meantime, the defendant, without your petitioner's knowledge, and under the evil advice of her brother and others, prepared a false will and applied for a certificate to the same Court, and also raised objection to the prayer made by your petitioner. The applications of both parties were investigated, and on the 23rd December, 1868, the Judge of the said Court, holding the will produced by the defendant false, and that produced by your petitioner true, rejected the defendant's prayer and gave a certificate to your petitioner. Dissatisfied with that decision, the defendant appealed to the High Court, and that Appellate Court, upholding the order rejecting the defendant's false will, remanded the case to the said Judge for further investigation into your petitioner's will. After investigation the papers were sent back to the Appellate Court with an opinion that your petitioner's will was genuine. But unfortunately for your petitioner, the Appellate Court, unjustly impugning this will, reversed the order of the Judge on the 13th July 1870, from which date the cause of action in the present case has accrued."

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The Subordinate Judge of Faridpore held that the plaint was insufficiently stamped, and accordingly rejected it.

The plaintiff appealed to the High Court.

Baboo *Srinath Das*, for the appellant, contended that as the suit was for a declaratory decree confirming the possession of the plaintiff and not for recovery of possession, it was properly stamped under clause 3, article 17, schedule II, Act VII of 1870. The plaintiff was in possession, and the decree, if a decree be passed, would be merely for confirmation of that possession there being no prayer for any consequential relief. The stamp was therefore sufficient.

Baboo *Kali Mohan Das* and *Grija Sankar Mazumdar*, for the respondent, were not called upon.

The judgment of the Court was delivered by

KEMP, J.—This appeal turns upon the question whether the lower Court was right in rejecting the plaint in the suit because it was not sufficiently stamped. The appeal to this Court is that this suit was sufficiently stamped, under clause 3, article 17 of schedule II, Act VII of 1870. That clause is to the following effect: "To obtain a declaratory decree where no consequential relief is prayed, the proper fee is 10 rupees." The amount of property

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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 the form of retaining the plaintiff in possession, may be made and process in execution 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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 June 1

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.