

APPELLATE CIVIL.

Before Mr. Justice Kemp and Mr. Justice Pontifex.

JOY KOOMAR DUTTA JHA (PLAINTIFF) *v.* ESHAREE NUND DUTTA
JHA (DEFENDANT).*

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Sept. 6.

Review—Act VIII of 1859, ss. 376 and 378—Order refusing to admit a Special Appeal, Power of High Court to grant a Review of—Notice.

An order refusing to admit a special appeal is open to review, and the application for review may be made without notice to the other side.

AN application for the admission of a special appeal in this case was rejected on the 12th July 1871. Subsequently there was an application for a review of the order refusing to admit the special appeal, and on the 2nd December 1871, the review was granted, and the special appeal was directed to be registered.

The *Advocate-General*, *offg.* (Mr. Paul,) (with him Baboos *Juggudanund Mookerjee* and *Romesh Chunder Mitter*), for the respondent.

Mr. *Woodroffe* (with him Baboos *Rashbehary Ghose* and *Omesh Chunder Banerjee*) for the appellant.

The *Advocate-General* for the respondent, objected to the hearing of the appeal. He contended that an order refusing to entertain a special appeal cannot be reviewed; and that even if a review were allowed by law, it could not be granted without notice to the opposite side, which was not served in this case. The appeal is now improperly before the Court, and ought not to be heard, as the order admitting the appeal is wrong and without jurisdiction. S. 376 of Act VIII of 1859 only allows a review of judgment where there has been a decree of Court consequent upon such judgment, and not otherwise.

* Special Appeal, No. 265 of 1872, from a decree of the Judge of Beerbhoom, dated the 13th March 1871, affirming a decree of the Subordinate Judge of that district, dated the 26th April 1870.

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Mr. Woodroffe for the appellant.—*In the matter of the Petition of Barmutollah (1)*, it was held that this Court could review an order (1) *Before Mr. Justice Bayley and Mr. Justice Markby.*

IN THE MATTER OF THE PETITION OF
BARMUTOLLAH.

The 4th April 1872.

Mr. M. Ghose for the petitioner.

THE judgment of the Court was delivered by

MARKBY, J.—In this case an application for the admission of a special appeal was made to this Court on the 19th December last. The petition contained ten grounds of appeal; and after hearing a pleader in support of the application, it was rejected by two Judges. There is now presented to us an application for a review of the order passed rejecting the application to admit the special appeal, treating that rejection as a judgment to which Ch. xi of the Code of Civil Procedure, relating to reviews, is applicable. The application for review contains four new grounds of special appeal in addition to the ten old ones; and, if it were the first application to admit a special appeal, it would be too late.

Assuming the rejection of the application to admit a special appeal to be a judgment which may be reviewed, we think we ought still to consider whether we ought to entertain the application for review. It is not suggested that there is anything peculiar or exceptional in this case, or that there has been any new discovery since the case was last heard; or that there has been any miscarriage by the Court; or that the case put forward on the last occasion, was not correctly understood and disposed of. It is only said that "the real ground of special appeal in this case was not properly and expressly put forward on the last occasion, though it appears from the old grounds that there was some allusion to them."

In short, it comes to little more than this

that the case having been once argued by a vakeel of long standing and great experience, another advocate now states that he can put the applicant's case more forcibly. I entirely admit that this Court has a discretion to admit applications for review in any case in which it considers that it is desirable for the ends of justice to do so; but I also think it has a discretion before it is called upon to hear a case re-argued, which has been already once determined, to require some explanation to be given why this exceptional course should be followed; and I think that such a statement as that which is made in this case does not amount to such an explanation as we are entitled to require. Mr. Ghose contends that we ought to hear his argument in support of the application to admit the special appeal, in order to see whether the ends of justice require that a review should be granted. But that evades the whole question. If we are bound to hear his application, in order to see whether it ought to be granted, it is obvious that every application to admit a special appeal may be made, and must be heard as many times over as the parties choose to present a petition for review, for it has been held by this Court that there is no limit to the number of applications for review. Tomorrow we may have a third advocate, who thinks he can put the case more forcibly than Mr. Ghose, the next day a fourth, who thinks he can put it more forcibly still, and so on *ad infinitum*. The power of review is a most valuable one if properly exercised, but it would be a grievous injustice to the large number of suitors who are waiting to be heard, if we were to allow parties, who have once had a fair opportunity of appearing and placing their case before the Court, to come up over and over again, in order to try and put their case better. The petitioner in this case has had three distinct hearings in three different Courts

refusing to admit a special appeal. There can be a review of an order relating to the execution of a decree—*Haradhun Mookerjee v. Ohunder Mohun Roy* (1). In the first case cited, this Court assumed that it could review its order, and on other grounds rejected the application. In s. 376 of Act VIII of 1859, the word “decree” is equivalent to the word “judgment.” Assuming the right of review, want of notice is no defect, and cannot vitiate the proceedings. In this case there was no opposite party. The law allows an appeal against an order rejecting a plaint; could it be said that such an order cannot be reviewed because the defendant was not before the Court? If the order for the admission of a special appeal can be made without notice to the opposite party, why cannot there be a review of such order without notice also? The objection is raised too late. If the respondent felt aggrieved, he should have moved to have the appeal taken off the file. In *Bharutt Ohunder Roy v. Issur Ohunder Sircar* (2), it was held that an appeal cannot be rejected at the hearing after its admission, on the ground that it had been admitted after time.

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The *Advocate-General* in reply.—In the case of *Bharutt Ohunder Roy v. Issur Ohunder Sircar* (2), Peacock, C.J., held that the objection there alluded to could not be taken at all, not that the hearing of the appeal was not the proper time to take it. In the matter of the *Petition of Barmutollah* (3), the Court assumed the very point now raised without deciding it. That case therefore cannot be treated as an authority on this question.

The judgment of the Court was delivered by.

KEMP, J.—A preliminary objection has been made by the *Advocate-General*, who appears for the special respondent, to the hearing of this appeal. He contends, first, that an order rejecting an application for the admission of a special appeal is and I think that, in the absence of any special circumstances, we may assume that his case has been sufficiently investigated. I may add that, whilst this case has been under consideration, I have sat to hear an application for review with

L.S. Jackson, J., and he expressed in that case similar views to those which I have expressed here, in which I concurred.

(1) Marsh., 205.

(2) 8 W. R., 141.

(3) *Ante*, p. 156.

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not open to review, second, that in the present case the Court has reviewed its order without giving notice to his client.

The original application for the admission of the special appeal was filed in proper time; it was rejected on an *ex parte* hearing on the 12th of July 1871. On this Mr. Money applied to the Court to re-consider its order; and the Court, after hearing Counsel, and being satisfied that there was good and sufficient reason for so doing, on the 2nd December 1871, directed the application to be registered.

Previous to the passing of the new rules which regulate applications for the admission of a special appeal, parties could, as a matter of right, file a special appeal; and in the event of their appeal being unsuccessful, they could apply for a review, and that too more than once. The new rules do not and cannot take away this right, and we find that this Court has recognized such a right in cases where an application for the admission of a special appeal has been rejected—*In the matter of the Petition of Barmutollah* (1).

Then it is said that, under s. 376 of Act VIII of 1859, applications for review can only be made of a decree of a Court, but it has been held by a Divisional Bench, in the case of *Cochrane v. Heera Lal Seal* (2), that this Court has power to review an order.

Lastly, it was contended by the Advocate-General that, under s. 378 of Act VIII of 1859, no review of judgment can 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. Now, in the case before the Court, there could be no opposite party. The first application for the admission of a special appeal was necessarily *ex parte*, as also was the second application praying the Court to re-consider its order rejecting the first application. We overrule the preliminary objection, and proceed to try the special appeal.

(1) *Ante*, p. 156.

(2) 7. W. R., 79.