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dhry v. *A. D. Sandes* (1), *Khelut Chunder Ghose* v. *Prankisto Day* (2), *Umrao Thakur* v. *Cakul Mandal* (3)' and *Nudarchund*

the decision of the Privy Council), the order of the Principal Sudder Ameen admitting the review, without stating that he was satisfied that there was good reason for the delay in presenting the petition of review, cannot stand." These words are so opposite to the present case that one might suppose that they were pronounced in direct reference to the facts before us.

The Principal Sudder Ameen has here admitted the review after the expiration of ninety days prescribed by s. 377 of Act VIII of 1859, and he has not shown or stated that he was satisfied there were good reasons for the delay. It follows, therefore, on the authority of the above case alone, that the judgment of the Principal Sudder Ameen on review cannot be upheld, and must be reversed.

It is not necessary that I should go further into the matter of the special appellant's objections, but I think it right to say that if, as appears to have been the case, there was no new matter brought before the Principal Sudder Ameen at the hearing of the review, which the petitioner in review could not with reasonable diligence have obtained, brought forward, or urged, at he time of the original hearing, or some other like cause affecting the administration of substantial justice between the parties, the review ought not to have been entertained, even had the application for review been preferred within the limited time of ninety days. When one a Civil Court has passed a final decision between the parties, it loses jurisdiction over the suit except for the purposes of executing the decree, and it cannot hold a new trial of the same unless, for some reason within the Procedure Act, the first trial appears to have been unfair between the parties. We reverse the decision of the Principal Sudder Ameen made on review, and confirm the decree which he made on the original hearing on appeal on the 20th of April 1864. The special appellant must have his costs in this Court, and also his costs in the lower Court on review.

(1) 8 B. L' R., App., 35, note.
(2) *Before Mr. Justice L. S. Jackson and Mr. Justice Glover.*

The 1*st December* 1869.

KHELUT CHUNDER GHOSE (PLAINTIFF) *v.* PRANKISTO DAY AND OTHERS (DEFENDANTS).*

Review—New Evidence.

Baboo *Motilall Mookerjee* for the appellant.

Mr. *H. E. Mendies* and Baboo *Prosonno Coomar Roy* for the respondents.

THE judgment of the Court was delivered by

L.S. JACKSON, J.—The Subordinate Judge, in this case, first dismissed the suit of the plaintiff on the ground that the plaintiff had not substantiated his right to maintain the suit, as the purchaser of the rights of the parties entitled to wasilat. Thereupon the

(3) 8 B. L. R., App , 34.

* Special Appeal, No. 1994 of 1869, against the decree of the Judge of Zilla Beerbhoom, dated the 10th May 1869, reversing the decree of the Subordinate Judge of that district, dated the 25th January 1869.

Bhooya v. *Reedoy Mundul* (1): These cases show what the word "final" in s. 378 means. In construing an Act it is necessary to look to the consequences that would follow any particular

plaintiff applied to that Court for a review of judgment on four grounds:

"1st,—that the plaintiff could not file his deed of purchase as it had been filed in a summary case, No. 41 of 1868, which was still pending; 2nd,—that case, No. 41, is a case for mesne profits of the same property, but only for an antecedent period, hence he was obliged to file the deed of purchase in that case; 3rd,—that his vendors had admitted the purchase by him in the name of Rohinee Nundun Mitter, in case No. 41, and Rohinee Nundun in the same case admitted his purchase, and that he has brought no objection in this case, and is willing to put in a petition of consent; 4th,—that the applicant is willing to prove his puschase." "With this petition," the Judge observes, "the applicant filed copies of the deed of sale and of the admissions." On this the Subordinate Judge admitted the review making his order in these words:—"Whereas the grounds urged in the petition for review by the applicant are sufficient, and the vendors also have admitted the sale by petition, it is ordered that the application be granted, and the case be restored." Thereupon the Subordinate Judge heard the case *de novo*, and gave judgment for the plaintiff.

Against the judgment so obtained, the defendant appealed to the Zilla Court. The Judge, on hearing the appeal, considered that the Subordinate Judge, had irregularly admitted the application for review, and thereupon set aside the whole of the proceedings founded upon that irregular admission of the review, and decreed the appeal, thereby dismissing the plaintiff's suit. The Judge supports his decision by reference to the case of *Naffar Chand Pal Chowdhry* v. *A. D. Sandes* (*a*).

It is urged before us in special appeal that we ought to assume that the Subordinate Judge, in admitting the review, had good and sufficient reasons for so doing, and that, upon that assumption, the admission of the documents tendered by the plaintiff would be justified, and reference is made on this argument to the case of *Behari Lal Nandi* v. *Srimati Trailakhomayi Barmani* (*b*).

It seems to me perfectly clear that the Subordinate Judge admitted this review upon the grounds stated in the petition for review, and upon no others, and it seems perfectly clear that those grounds related exclusively to the fresh matter tendered as evidence by the plaintiff, and that the object of that application was to get in that fresh matter, and nothing else. It is not denied that the petition so presented was unverified and supported by no proof of the kind referred to in the case cited—*Naffa Chand Pal Chowdhry* v. *A. D. Sandes* (*a*). That being so, it seems to me that we ought to follow the ruling laid down in that case, and that the Judge's decision was therefore right, and that this special appeal ought to be dismissed with costs.

(1) *Ante*, p. 424.

(*a*) 8 B. L. R., App., 35, note.

(*b*) 3 B. L. R., 346.

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construction with reference to the intention of the Legislature. Now, in *Nasiruddin Khan* v. *Indronarayan Chowdhry* (1), a second review was allowed, although the order is said to be final. the same view was taken in *Shamachurn Chuckerbutty* v. *Bindabun Chunder Roy* (2), in which a review was admitted after the lapse of ninety days; but it was set aside, showing that the word "final" does not mean that the Court cannot question the order admitting a review.

Baboo *Rajender Bose*.—S. 376 no doubt has the restricting words " from the discovery of new matter or evidence which was not within his knowledge, or could not be aduced by him at the time when such decree was passed;" but s. 373 makes the order final. The only case in which the order is not final is where no notice is given. Ss. 376 to 378 follow s. 372, by which appeals are allowed. These sections, therefore, are exceptions to the law laid down in s. 372. An order, therefore, admitting the review is final, and cannot be questioned—*Shaik Gholam Hossein* v. *Okhoy Coomar Ghose* (3) and *Cochrane* v. *Heralal Seal* (4). The following cases were also relied on : *Gurumúrti Náyudu* v. *Pappa Nàyudu* (5), *Subbramaniya Pillay* v. *M. Perumal Chetly* (6), *Dunka Devla* v. *Hira Ramla* (7), and *Apcar* v. *Howah Bye* (8).

The following Judgments were delivered:—

COUCH, C. J. (PONTIFEX and AINSLIE, JJ., concurring) (after reading the question referred, continued).—Now, in a special appeal, a decision passed in regular appeal may be questioned on the ground that there has been a substantial error or defect in law in the procedure or investigation of the case which may have produced error or defect in the decision of the case upon the merits. In this case the Judge of the lower Court allowed a review of a decision passed in regular appeal without any

(1) B. L. R., Sup. Vol., 367.
(2) Case No. 1335 of 1866 ; 30th January 1868.
(3) 3 W. R., Act X Rul., 169.
(4) 7 W. R., 79
(5) 1 Mad. H. C. Rep., 164.
(6) 4 Mad. H. C. Rep., 251.
(7) 4 Bom. H. C. Rep., A. C., 57
(8) 1 I. J., N.S., 237.

enquiry or proof that the new evidence was not within the knowledge of the applicant for the review at the hearing of the case, or could not be adduced by him when the decree was passed.

It was admitted that this was so. S. 376. Act VIII of 1859, allows an application to be made for a review by any person who, from the discovery of new matter or evidence which was not within his knowledge, or could not be adduced by him at the time when the decree was passed, or from any other good and sufficient reason, may be desirous of obtaining a review of the judgment passed against him. In order that the Court may grant a review on the ground of the discovery of new matter or evidence, it must be such a case as is here described; and if a Court grants a review without its being shown that the evidence was not within the knowledge of the applicant, or could not be adduced by him when the decree was passed, it is an error in the procedure—it is granting a review when the law does not allow one to be granted,—granting it in a case which does not come within those specified in the section which allows an application to be made for a review.

It is true that in s. 378 the words of s. 376 or not repeated. It is said generally:—"If the Court shall be of opinion that there are not any sufficient grounds for a review, it shall reject the application;" and if the applicant does not show any such grounds as are described in s. 376, that is to say, if the application is not supported by proof that there are such grounds, it ought to be rejected. It would not be proper for the Court to receive an application on account of the discovery of new evidence without having some proof of the truth of the allegation. In another part of s. 378 it is said that, "if it (the Court) 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." But I do not think that this part of the section is applicable to the present case, because the application for a review was upon the specific ground of discovery of new evidence. It appears to me that the act of the lower Court in granting the review, as it did, without any evidence of the fact which was necessary to make the granting it allowable, was an error of law in the procedure

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which is a ground of appeal when the decision upon the review is brought before this Court in special appeal.

Then what is the effect of s. 378? It says that the order of the Court granting the review or rejecting the application shall be final. Is that to be read as controlling the right of special appeal to the extent that, when the decision upon the review is brought before the Court, it is not to take notice of the error in law in the procedure by granting the review and rehearing the case? It appears to me that, taking the sections together, we ought not to give such an effect as that to the word "final." It means there, as it does in some other parts of Act VIII, for instance in s. 257, that the order rejecting the application or granting the review shall not by itself be open to appeal. A person shall not be at liberty to go to the Appellate Court and contend that the Court which has refused or has granted a review ought not to have done so. But the word is not to be so construed that, when the decree in the suit has been made, the legality of the order granting the review shall not be in any way questioned; that, although the review may have been illegally granted, no question about it shall be allowed to be raised, and a person who had a decree in his favor shall not be at liberty to show that he was illegally deprived of the benefit of it by the Court granting a review, where the law has not said that a review may be granted to a person who merely said that he had discovered fresh evidence, but did not bring himself within the provisions of the law which says that the discovery shall be of evidence "which was not within his knowledge, or could not be adduced by him at the time when the decree was passed."

I think that is the construction which we ought to put upon these words in s. 378, and that it is proper that the parties in a special appeal shall be at liberty to show that there has been an error or defect in the procedure by the granting of the review which has affected the decision of the case upon its merits, by producing a different decision from what had been before come to.

JACKSON, J.—I am of the same opinion. In the state of

the law before the Civil Procedure Code was enacted, it was not competent to the inferior Courts in Bengal to review their own judgments without the sanction of the superior Courts. By s. 376 (Civil Procedure Code), all Civil Courts were empowered to review their judgments for any of the causes set forth in that section, one of them being "the discovery of new matter or evidence which was not within his (the applicant's) knowledge, or could not be adduced by him at the time when the decree was passed against him." This seems to be a specific cause on which a party aggrieved by a decree is entitled to apply for a review of such decree. I think that, in respect of that cause, the power of the Court to grant a review is specially limited by the words of that section. Then s. 378 declares that the order of the Court whether granting or rejecting the review "shall be final." That seems to me to bring the order into the position of an interlocutory order within the meaning of s. 363, that is to say, that it is an order not of itself appealable, but which "may be set forth as a ground of objection in the memorandum of appeal," if, in pursuance of the admission of a review of judgment, a decree be passed against the party against whom the review is granted.

I quite concur, therefore, in thinking that, although an order granting a review cannot be made the subject of appeal standing alone, yet the appellate Court can take notice of it in special appeal, and if the review was improperly granted, can set aside the judgment passed in furtherance of such review.

PHEAR, J.—I concur generally in what has been said by the Chief Justice. It has, on several former occasions, fallen to me to express my views on this matter of review under the Civil Procedure Code of this country, and those views are reported in more than one of the cases which have been referred to. I do not, therefore, think it necessary to add anything to what has already been stated very fully by the Chief Justice.

It seems to me that we ought to answer the question which has been referred to us in these words:—The orders of the Subordinate Judge granting a review can be questioned in special appeal.