

FULL BENCH RULING.

*Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice Jackson,
Mr. Justice Phear Mr. Justice Pontifex, and Mr. Justice Ainslie,*

1873
May 20.

BHYRUB CHUNDER SURMAH CHOWDHRY AND ANOTHER (PLAINT-
PIFS) *v.* MADHUBRAM SURMAH, *alias* MADHUB CHUNDER
SURMAH, AND OTHERS (DEFENDANTS).*

Review—Act VIII of 1859, ss. 376 to 378—Appeal—“Final.”

Where a Subordinate Judge, after deciding a regular appeal granted an application for review of judgment on the ground that new evidence had been discovered, but without any enquiry or proof that such evidence was not within the knowledge of the applicant, or could not be adduced by him at the time the decree was passed, *held* that this was an error or defect in the procedure or investigation of the case which affected the decision, and was a ground of appeal when the decision upon review was brought before the High Court on special appeal.

The word “final” in s. 378 of Act VIII 1859 means that the order rejecting the application or granting the review shall not by itself be open to appeal.

In this suit, which was brought to recover certain plots of land, the Subordinate Judge of Sylhet, on the 8th of January 1862, on appeal, gave a decision in favor of the plaintiffs. The defendants, Madhub Chunder Surmah and Bhyrub Chunder Surmah, filed a petition for a review of the judgment with respect to plots Nos. 3 and 4 of the lands in suit, and an application for review of the judgment as to plot No. 4 was granted on the ground that new evidence had been discovered. The suit was then retried as to plot No. 4, and the result was that the suit was dismissed as to that plot with costs.

The plaintiffs then preferred this special appeal, which was heard before Couch, C.J., and Glover, J. It was objected that the lower Appellate Court was wrong in allowing a review without

* Special Appeal, No. 957 of 1872, from a decree of the Subordinate Judge of Sylhet, affirming a decree of the Munsif of Russoolgunge, dated the 23rd of January 1871.

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enquiry or proof that the new evidence was not within the knowledge of the applicant for review at the hearing of the case, or could not be adduced by him when the decree was passed. It was admitted that no evidence of the statement in the petition for review was taken.

The question, therefore, arose whether the order of the Subordinate Judge granting the review was not final, and could not be questioned in this special appeal.

The decisions in the High Court were conflicting. On one side were *Naffur Chand Pal Chowdhry v. Sandes* (1) *Umrao Thakur v. Gakul Mandal* (2) and *Nudarchund Bhooya v. Reedoy Mundul* (3); and on the other, *Shaikh Gholam Hossein v. Okhoy Coomar Ghose* (4) and *Cochrane v. Heralal Seal* (5).

(1) 8 B. L. R., App., 35, note.

(2) *Id.*, 34.

(3) *Before Mr. Justice Kemp and Mr. Justice Glover.*

The 14th March 1872.

NUDARCHUND BHOOYA (ONE OF THE DEFENDANTS) v. REEDOY MUNDUL (PLAINTIFF).*

Review—New Evidence.

Baboo *Grish Chunder Ghose* for the appellants.

Baboo *Mohendro Loll Mitter* for the respondent.

THE judgment of the Court was delivered by

GLOVER, J.—The substantial question for decision in this special appeal is whether the Deputy Commissioner has acted according to law in admitting a review of judgment.

The circumstances are as follows:—
The plaintiff sued for possession of

land leased to him by Haradhone Dass in the year 1276 B.S. (1869), and of which the defendants Sooroof Bhooya and others kept him out of possession. These defendants claimed to hold of the same Haradhone Dass on a lease granted in 1261 B.S. (1854), and denied the power of the zemindar to oust them, they having, by a tenancy of more than twelve years, obtained a right of occupancy.

The zemindar, who was made what is called a *pro forma* defendant, supported the plaintiff's case. The lease to the defendant was for four years only, on the expiry of which the land was given to the plaintiff. The Munsif decreed the suit in favor of the plaintiff. But the Deputy Commissioner on appeal reversed that decision, holding that the potta of the defendants was genuine, and that their possession for more than twelve years was clearly proved.

(4) 3 W. R., Act X Rnl., 169.

(5) 7 W. R., 79.

* Special Appeal No. 920 of 1871, from a decree of the Deputy Commissioner of Maunbhoom, dated the 9th May 1871, affirming a decree of the Munsif of that district, dated the 25th November 1869.