Baboo Tarucknath Sein for Appellant.
No one for Respondents.

A Moonsiff's order granting a review without proof that the new evidence tendered was not available before was held to be illegal, as well as the decision of the Lower Appellate Court confirming that order.

Bayley, J.—We think the judgment of the Lower Appellate Court in this case must be reversed.

The ground pressed upon us is that the first Court admitted a review without complying with the provisions of Section 376 Act VIII of 1859, in respect of being satisfied that the new evidence on which the application was admitted was not within the petitioner's knowledge or could not be adduced by him at the time when the decree was passed, and the Lower Appellate Court has acted illegally in confirming the judgment of the first Court passed on that review.

The first order passed by the Moonsiff on the application for review was that it should be put up with the record. With that application no new evidence was tendered, but it was subsequently. Now, no deposition or affidavit was taken from the defendant or from any one representing him or with knowledge of the facts. No enquiry was made by the Moonsiff as to whether the new evidence tendered was not available before the decision of the case. The application for review was admitted by the Moonsiff without a due regard to these provisions of the law, and the former judgment which was in favor of the special appellant reversed on such review.

The Lower Appellate Court has affirmed the judgment of the Moonsiff without meeting the objection specifically taken by the special appellant, *viz.*, that it was requisite under the law that proof should be given that the new evidence tendered was not available before.

The following cases have been cited by the special appellant in support of his contention that the judgments of the Lower Appellate Courts are erroneous in respect of the above particulars :—Weekly Reporter, Volume II, page 174 ; Weekly Reporter, Volume X, page 432 ; Weekly Reporter, Volume XII, page 536 ; Weekly Reporter, Volume XIV, page 26 ; and we think that the decisions cited support the contention. No one appears on the other side to contest the special appeal, and under the circumstances,—looking specially to the terms of Section 376 which clearly prescribe that a party tendering new evidence as a ground of review should shew that the new evidence " was not within his knowledge or " could not be adduced by him at the time " when the decree was passed," and to the fact that there is no proof of the above particulars in the present case,—we think that the order passed by the Moonsiff admitting the review was illegal, and the decision of the Lower Appellate Court confirming that order equally so.

In this view, we reverse the judgments of the lower Courts and decree this appeal with all costs.

The 1st June 1871.

Present :

The Hon'ble H. V. Bayley and W. Ainslie, *Judges.*

Contribution—Use and occupation.

Case No. 192 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Rajshahye, dated the 29th August 1870, *reversing a decision of the Moonsiff of that District, dated the 24th February* 1870.

Gudadhur Chowdhry (Plaintiff) *Appellant,*

versus

Shama Churn Mitter (one of the Defendants) *Respondent.*

Baboo Mohinee Mohun Roy for Appellant.
Baboo Issur Chunder Chuckerbutty for Respondent.

The land of a jote jumma belonging to plaintiff and one *D* having been attached in satisfaction of a joint decree for arrears of rent, plaintiff deposited the entire amount of the decree. He then sued *M*, who had obtained *D's* share of the jote, for contribution on the ground that *M* was in use and occupation :

Held that the case against *M* was not met by the plea that he was not a party to the suit in which the decree was obtained.

Bayley, J.—We think in this case the judgment of the Lower Appellate Court must be reversed, and the judgment of the Moonsiff affirmed, with this exception that the decree should in the first instance go against the defendant, Shama Churn Mitter, and not as a lien against the jote, which the Moonsiff directs.

The plaintiff sued for contribution on the ground that Shama Churn was the party in use and occupation of the jote.

Shama Churn, as defendant, did not traverse or deny these allegations made in the plaint, but only said that, as he was not a party to the suit in which the decree was obtained, he was not liable for contribution.

The first Court summoned Shama Churn to appear and depose as the person best knowing if, and for how long, he was in use and occupation ; but as Shama Churn did not appear, the first Court, upon the evidence in the case, as also under the provisions of Section 170 Act VIII of 1859, gave the plaintiff a decree against him.

The Lower Appellate Court has reversed that decision without really touching the main point in the case. It is quite true that for the purposes of the decree in the suit for arrears of rent, Joy Soonduree was the party against whom and in whose presence the decree was passed, and so far as the question of that decree for rent went, Shama Churn is right in saying that he was no party to the decree. That however does not meet the case against him now before us. The plaintiff's allegation was that granting Shama Churn was no party to the suit in which the decree for arrears of rent was obtained, yet this was not a suit for arrears of rent, but for contribution of the quota due from a party in use and occupation, and Shama Churn does not as a matter of fact deny that he was in use and occupation. It is this point which the Lower Appellate Court should have carefully adjudicated, and it has erred in law in not doing so.

With the exception, therefore, of that portion of the decree of the Moonsiff, where he says that it should in the first instance go against the jote as under a lien, and not against Shama Churn and other defendants, we think the decision of the Moonsiff should be restored and affirmed and the decision of the Lower Appellate Court reversed with all costs.

The 2nd June 1871.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Butwarrah—Co-sharers—Right of suit.

Case No. 2695 of 1870.

Special Appeal from a decision passed by the Judge of Sarun, dated the 17th September 1870, *affirming a decision of the Subordinate Judge of Chumparun, dated the 19th March* 1870.

Khedoo Thakoor and another (two of the Defendants) *Appellants,*

versus

Bhugwut Lall and others (Plaintiffs) and others (Defendants) *Respondents.*

Mr. R. E. Twidale and *Baboo Boodh Sein Singh* for Appellants.

Baboos Chunder Madhub Ghose and *Debendro Narain Bose* for Respondents.

Where the Collector directs that a separate account should be opened with the sharer of an estate on his application, and his share is found not to be such as he states it to be, the co-sharers are at liberty to bring a suit in the Civil Court to establish the extent of their shares, in the event of the Collector under the Butwarrah law rejecting their application for a division of their specific shares.

Kemp, J.—We have no doubt whatever in this case that the decisions of the lower Courts, the decision of the Subordinate Judge in particular which is a very careful and well-considered one, are just and proper decisions.

The grounds taken in special appeal are,—first, that the suit of the plaintiff being to set aside on auction sale held for the recovery of arrears of Government revenue the suit ought to have been brought within one year. The next point taken is that