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been granted here when the Court in India, admitting the appeal, had refused to stay execution; but a stay had been granted only when special leave to appeal had been obtained from their Lordships. A note on *Indur Kunwar* v. *Jaipal Kunwar* (1), in Wheeler's Privy Council Law, 446, related to this. He referred to the difference of opinion between the Judges below, contending that on the grounds taken before them they should have granted a stay in the discretion given them by section 608, sub-section (c.)

Their Lordships were of opinion that, as the two Judges of the Court below had differed in opinion, their discretion had not been exercised, as they were empowered to exercise it, under section 608 of the Civil Procedure Code, without there being occasion to grant special leave to appeal from the order of the 27th April 1894. The case was one in which a stay of execution should be ordered on this petition.

Petition granted.

The order of Her Majesty in Council followed, dated the 5th August 1894.

Solicitors for the petitioner: Messrs. *Barrow & Rogers.*

APPELLATE CIVIL.

Before Mr. Justice Trevelyan and Mr. Justice Ameer Ali.

HAR NANDAN SAHAI (PLAINTIFF) *v.* BEHARI SINGH (DEFENDANT.)*

1894 *June 6.*

Appeal—Order granting review of judgment—Civil Procedure Code (Act XIV of 1882), section 629.

No appeal lies from an order granting a review of judgment except as provided by section 629 of the Civil Procedure Code. *Bombay and Persia Steam Navigation Co.* v. *S. S. "Zuari"* (2) followed.

THE facts of this case, so far as they are material, are stated in the judgment of the lower Appellate Court, which was as follows:—

* Appeal from Appellate Decree No. 1853 of 1893, against the decree of Babu Krishna Nath Roy, Officiating Subordinate Judge of Sarun, dated the 26th of July 1893, reversing the decree of Babu Upendro Nath Bose, Munsif of Chupra, dated the 12th of July 1892.

(1) I. L. R., 15 Calc., 725; L. R., 15 I. A., 127. (2) I. L. R., 12 Bom., 171.

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"This is an appeal from a decision and judgment of the Munsif, first Court, Chupra, passed in a suit brought by the plaintiff Har Nandan Sahai for the declaration of his right to a small piece of land that intervenes between his and the defendant-appellant's land. The suit was at first, on the 11th September 1891, dismissed upon the evidence that was before him. A review of his judgment was applied for, and it was granted. The parties were allowed to adduce fresh evidence and the suit has been decreed in plaintiff's favour. Hence the defendant appeals against the learned Munsif's order granting the review as well as against the subsequent decree passed in plaintiff's favour.

"The plaintiff's suit was at first dismissed under the following circumstances: The parties had their witnesses in attendance on the 9th September 1891, but the plaintiff made a special application relying solely on the defendant Behari Singh's testimony if he were to give evidence upon a particular form of oath. The defendant Behari Singh was not present in Court at the time. An application was made on his behalf, asking for time, and the 14th September 1891 was fixed for trial with a direction that witnesses should be produced on that day.

"On the 14th of September the defendant Behari Singh came with his witnesses, but Behari Singh declined to give evidence on the particular oath required of him. He however expressed willingness to give evidence on solemn affirmation. The plaintiff's pleader after that examined the defendant Behari Singh on administration of the usual solemn affirmation, who instead of proving the plaintiff's case supported his own. The Munsif then called upon the plaintiff's pleader to adduce any other evidence in the cause. But no such evidence being forthcoming, the suit was dismissed on the ground that the plaintiff failed to prove his own case.

"The plaintiff thereupon applied for a review of the judgment on four grounds:

"1. If the defendant had taken the special oath required of him, the plaintiff would not have the necessity of any other evidence, and it was for this reason the plaintiff had not given a *hazari* of his witnesses, ...

"2. That on the 9th September 1891 the defendant, not having been present when the special application for his examination was made, an application for time on his behalf agreeing to take the special oath was made, in consequence of which the 14th September was fixed for hearing, and that there was no clear order passed on the plaintiff to produce his witnesses on that day. But if there was any such order, the parties did not understand it. That it was for this reason the parties did not submit their *hazari* of witnesses on the 17th September 1891, and that the plaintiff's witness who was in attendance, believing that the defendant would take the special oath, disappeared.

"3. That the plaintiff understood that the defendant had no objection to

taking the special oath and wanted time only to appear on the 14th September 1891, and that the suit would be disposed of on such evidence ; he did not think it worth while to attend the Court, and he, the plaintiff, who is a *mukhtear*, went away to Akwa to attend to his client's case, which was then being heard by the Deputy Magistrate while on tour, but he thought he would avail of the train that reaches at mid-day, which he could not do for want of time.

"4. That the defendant on the 14th September 1891 attended, but he did not object in writing to the special oath being administered on him. On his refusing to take the particular oath required of him, the plaintiff's pleader applied for time, when the Court wanted him to produce his witnesses, but the Court without giving heed to his prayer decided the case, and after passing judgment rejected his application for time.

"It should be mentioned here that the plaintiff, by an application of the 7th November 1891, withdrew the latter part of the objection and asked to strike off the words "after passing judgment" from the fourth para. of his objections.

"The defendant-appellant opposed the application and traversed all that the plaintiff stated.

"The learned Munsif, without taking any evidence of the truth or otherwise of the plaintiff's statements, admitted the review on the second ground, only observing : 'However as the plaintiff could not know before the 14th September 1891 whether the defendant would consent to swear specially, and as the plaintiff was not particularly ordered to produce his witnesses, I think that for the ends of justice this petition ought to be granted.'

"The defendant in his appeal contends that the learned Munsif's procedure is against the provisions of sections 623 and 626 of the Civil Procedure Code, and his order granting the review should be set aside, and all the proceedings taken by him since the 7th November 1891 should be quashed.

"The plaintiff-respondent's pleader on the other hand objects to the defendant's raising the question on appeal, as he is debarred by section 629 from taking up this question. His arguments are that that section provides 'an order of the Court for rejecting the application shall be final, but whenever such application is admitted, the admission may be objected to on the ground that it was (*a*) in contravention of the provision of section 624, (*b*) in contravention of the provisions of section 626, or (*c*) after the expiration of the period of limitation prescribed therefor and without sufficient cause.'

"Such objection may be made at once by an appeal against the order granting the application, or may be taken in any appeal against the final decree or order made in any suit.

"Section 626 says : 'If it appear to the Court that there is not sufficient ground for a review, it shall reject the application. If the Court be of opinion that the application for review should be granted, it shall grant

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the same, and the Judge shall record with his own hand his reasons for such opinion; provided that (*a*) no such application shall be granted without previous notice to the opposite party, &c., (*b*) no such application shall be granted on the discovery of new matter or evidence,' &c., without strict proof of such allegation.

"Therefore he contends, as the present case does not come within the provisos, and the Munsif held there was sufficient ground for granting the review, and as the review was not granted in contravention of section 626, the defendant has no right of appeal by section 629, and in support of his contention he cites the ruling of the Bombay High Court in the *Bombay and Persia Steam Navigation Co.* v. *S. S. "Zuari"* (1).

"His Lordship, SARGENT, C. J., construes section 626 as used in section 629 to mean that there may be an appeal on the ground that the Court has granted the review without first coming to a conclusion that there was 'sufficient ground' or without notice of the application for review having been given to the opposite party or without strict proof of the allegation referred to in proviso (*b*). His Lordship continues: 'In the present case we understand that the learned Judge, who made the order, was of opinion that there was sufficient ground for review, and he accordingly granted the application. It is not contended that there has been any violation of the rules contained in the provisos to section 626, and we must, therefore, hold that there is no appeal from the order.'

"This construction of section 626 as used in section 629 has been approved by our High Court in *Aubhoy Churn Mohunt* v. *Shamont Lochun Mohunt* (2).

"These two cases were decided on objections made at once by an appeal against the order granting the application for review, and not in any appeal against the final decree or order made in the suit. But we have authority under the old Procedure Code when the granting of a review was final to contest on appeal the order granting it. It is the case of *Prannath Bhadoory* v. *Sreekant Lahoory* (3).

"In that case the Munsif dismissed a suit; afterwards he issued a rule calling upon the defendant to show cause why a review of judgment should not be granted. The defendant showed cause, but his objections were overruled; the review was granted. Both plaintiff and defendant adduced new evidence, and a decree was given for the plaintiff. On appeal the Subordinate Judge reversed this decision on the ground relied upon by the defendant in showing cause in the lower Court, namely, that the plaintiff had not established that with due diligence he could not have produced in the original trial the evidence upon which his application for review was based. That is to say,

(1) I. L. R., 12 Bom., 171. (2) I. L. R., 16 Calc., 788.
(3) 2 C. L. R., 257.

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the Appellate Court went into the question whether there was due diligence wanting or not in producing in the original trial the fresh evidence upon which his application for review was based. Similarly in the present case the defendant asks to have it considered in appeal whether the learned Munsif's finding or 'sufficient reason' is sufficient or not, or in other words whether the interlocutory order granting the review was made on materials sufficient for coming to the same conclusion with the lower Court. I think I sitting in appeal on the decision of the first Court have a right to consider whether that order was correctly passed or not. The case of *Gopal Chandra Lahiri* v. *Solomon* (1) also supports this view.

"The appellant's pleader says that the plaintiff did not show by any evidence or affidavit that he was misled by any order of the 9th September 1891. The order runs thus : 'That the plaintiff has filed an application calling on the defendants to give evidence and asking to decide the case accordingly. But the defendant is absent. An application for adjournment on the part of defendant so that he might attend has been made. Hence ordered that the case be postponed till 14th September 1891 for disposal. The defendant's pleader should produce the defendant on that day, and witnesses should be produced.' The context of the order leaves no room to doubt that the parties were ordered to produce their witnesses on the date so fixed. The Munsif says the plaintiff was not 'particularly' ordered to produce his witnesses. I do not understand why any party should be particularly mentioned in an order to produce his witnesses. The order is general, and sufficiently directs that the parties should come ready with their witnesses. If the plaintiff had misunderstood that order he should have come into the witness-box and supported that part of his case, but he did not do it, nor did he prove that part of his case by any affidavit. I therefore consider that the learned Munsif was in error in allowing the application for review, when his order does not interpret that construction put upon it in the application for review, and specially when the defendant objected to putting that meaning on that order.

"The lower Court considered the other grounds unfounded and I need not refer to them.

"As the order granting the review is erroneous, I do not think I should take into consideration the mass of evidence recorded and received after that order.

"The evidence that is on record previous to the granting of the plaintiff's application for a review of the Munsif's judgment does not support the Munsif's second finding. The appeal will, therefore, be decreed and the plaintiff's suit be dismissed with costs in both Courts."

On appeal from this decision to the High Court the only material ground was that no appeal lay from the Munsif's

(1) I. L. R., 13 Calc., 62.

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order granting the review, and therefore the lower Appellate Court had no jurisdiction to find that that order was erroneous.

Babu *Nalini Ranjan Chatterjee* for the appellant.

Mr. *C. Gregory* for the respondent.

The judgment of the Court (TREVELYAN and AMEER ALI, JJ.) was as follows :—

In this case the question arises whether an appeal lay from an order of the Munsif granting a review of judgment. We have heard the question argued out, and in our opinion the decision of a Bench of the Bombay High Court in *Bombay and Persia Steam Navigation Co.* v. *S. S. "Zuari"* (1), is expressly in point in this case. We see no circumstances distinguishing that case from the present one, and we see no reason for distinguishing it. If we had to decide the question ourselves we should decide it in exactly the same way. The reasons for the decision are fully given, and we entirely agree with them. In our opinion no appeal lay from the order of the Munsif granting the review. We think we ought to add also that this question of granting the review was fully considered by the Munsif, and there were materials before him for granting the review.

The case must go back to the lower Appellate Court to decide the other questions arising in the appeal. Costs will abide the result.

J. V. W. *Case remanded.*

Before Mr. Justice Trevelyan and Mr. Justice Ameer Ali.

1894 *August* 8.

LALLA SHEO CHURN LAL AND ANOTHER (DEFENDANTS) *v.* RAMNANDAN DOBEY AND ANOTHER (PLAINTIFFS).*

Civil Procedure Code (Act XIV of 1882), sections 102, 103—Suit brought by next friend of minors and struck off for default of appearance—Gross negligence on the part of next friend—English rule of law—Law of equity and good conscience.

*Appeal from Appellate Decree No. 857 of 1893, against the decree of Babu Anantaram Ghose, Subordinate Judge of Sarun, dated the 20th of January 1893, reversing the decree of Babu Jogendra Nath Chuckerbutty, Munsif of Chuprah, dated the 31st of August 1892.

(1) I. L. R., 12 Bom., 171.