1875

HYDER ALI v. JAFAR ALI.

no damages were awarded. The plaintiff then proceeded to execute his decree, but as the defendant would only make over ten maunds instead of twenty-eight maunds demanded under the decree, the plaintiff refused to take the quantity offered to him, and brought the present suit in the Small Cause Court for the value of twenty-eight maunds and something over not mentioned in the case before the Munsif.

The Judge of the Small Cause Court decided that he had no jurisdiction to try the case, and referred to the High Court the following question:—Will this suit lie? As the defendant refused to make over the whole of the distrained property, which appears to amount to a refusal to withdraw the distraint, has not the plaintiff his remedy by a suit under s. 98 of the said Act (Beng. Act VIII of 1869)?

The parties were not represented in the High Court by pleaders.

The judgment of the High Court was as follows:—

GARTH, C.J.—The Judge of the Small Cause Court is right in thinking that the Small Cause Court has no jurisdiction, as the suit is clearly one which might and ought to have been brought under s. 98 of Beng. Act VIII of 1869.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Birch.

1875
Aug. 28.

ELLEM AND ANOTHER (DEFENDANTS) *vs.* BASHEER AND ANOTHER (PLAINTIFFS).*

Review—Act VIII of 1859, *s.* 376—*Error in Law.*

The production of an authority which was not brought to the notice of the Judge at the first hearing, and which lays down a view of the law contrary to that taken by the Judge, is not a sufficient ground for granting a review.

IN this suit, which was one for possession of certain land, the Subordinate Judge of Sylhet delivered his judgment on 13th

* Special Appeal, No. 2331 of 1874, against a decree of the Subordinate Judge of Zilla Sylhet, dated the 4th of July 1874, reversing on review his former decree dated the 13th of June 1874, and affirming a decree of the Sudder Munsif of that district, dated the 16th of April 1874.

June 1874, dismissing the suit, and reversing the decree of the Munsif. On 4th July the plaintiffs applied to the Subordinate Judge for a review of judgment, referring as ground for their application to two cases decided by the High Court in 1869 and 1873 respectively, which were opposed to the decision given by the Judge. The Subordinate Judge, on notice to the defendants, and on looking at the cases cited, granted the review, and re-tried the case. Eventually he reversed his former decision, dismissed the defendants' appeal, and confirmed the decision of the Munsif.

The defendants preferred a special appeal from his decision to the High Court, on the ground, among others, that the Judge had committed an error in law in admitting a review of his judgment though there was no error of law or fact in his decision, nor any other sufficient ground under s. 376 of Act VIII of 1859.

Baboo *Joy Gobind Shome* for the appellants.

Baboo *Chunder Madhub Ghose* and *Grish Chunder Ghose* for the respondents.

The judgment of the Court was delivered by

GARTH, C.J.—In this case the same question arises as in the last (1) with this difference: 1st, that the Subordinate Judge of Sylhet reviewed his own decision instead of his predecessor's; and 2ndly, that he gives as a reason for the review that he was referred by the pleader to two authorities, decided by the High Court many years ago, one of which he considered to be opposed to his former judgment. He, accordingly, made an order for the review, and reversed his previous decision.

But the case appears to us to depend upon precisely the same principle as the last, and must be decided in the same way. It is less objectionable, no doubt, in one sense, for a Judge to review his own decision than that of his predecessor's; but he has no more right to do so without sufficient reason in the one case than in the other; and we cannot consider that the production of

(1) *Beni Madhub Ghose* v. *Kali Churn Singh*, see *post*, p. 201 note.

1875

ELLEM v. BASHEER.

an authority to which the attention of the Judge was not called at the first trial, is sufficient ground for demanding a second trial. The parties ought to come prepared with all their materials, both of law and facts, at the first hearing, and if they do not come properly prepared, they ought not to be allowed, upon discovering that they had omitted to bring forward some decided case, to try the case over again upon the strength of their own omission. If the Judge had decided improperly upon a point of law, that would be a matter for appeal, not for review (1).

The appeal will therefore be allowed; the second decision of the Subordinate Judge will be reversed, and his first decision confirmed, and the appellant will be entitled to his costs of this appeal, as well as the cost of and incidental to the review.

Appeal allowed.

PRIVY COUNCIL.

P. C.*
1872
July 23, 24, 25
&
Nov. 26.

RAJKISHEN SINGH (PLAINTIFF) *v.* RAMJOY SURMA MOZOOMDAR AND OTHERS (DEFENDANTS).

[On appeal from the High Court of Judicature at Fort William in Bengal.]

Family Custom—Regs. XI of 1793 *and X of* 1800*—Discontinuance of Family Custom.*

In a suit to recover possession of an estate by virtue of an alleged family custom, under which the estate was descendible to the eldest son to the exclusion of the other sons, and was impartible and inalienable, it was uncertain what the nature or origin of the tenure of the estate was, but there had been admittedly a settlement of it by Government at the time of the perpetual settlement. *Held*, assuming the custom to have existed, that although by such settlement any incidents of the old tenure of the estate

* *Present:*—THE RIGHT HON'BLE SIR J. W. COLVILE, SIR B. PEACOCK, SIR M. E. SMITH, SIR R. P. COLLIER, AND SIR L. PEEL.

(1) So held in a similar case, *Nobeen Kishen Mookerjee* v. *Shib Pershad Pattuck*, 9 W. R., 161; but, see *Koh Poh* v. *Moung Tay* 10 W. R., 143, in which it was held that an error on a point of law may be ground for review.