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

1880 *July* 19.

SHUMSHER ALLY (DEFENDANT) *v.* KURKUT SHAH (PLAINTIFF).*

Review—New Trial—Mofussil Small Cause Court Act (XI of 1865), s. 21 —Civil Procedure Code (Act X of 1877), s. 624.

A Judge of a Mofussil Small Cause Court has jurisdiction to direct a new trial of a case tried by his predecessor, s. 21 of Act XI of 1865 not having been repealed by the Civil Procedure Code 1877.

Per GARTH, C. J.—The Judge, however, in dealing with applications for new trial under s. 21, should have regard to the rule laid down in s. 624 of the Code of Civil Procedure.

THIS was an application made to the Officiating Judge of the Sealdah Small Cause Court, under s. 21 of Act XI of 1865, for a new trial of a case, which had been decreed in favor of the plaintiff by Mr. Ryland, the permanent Judge of the Court. The plaintiff contended, *inter alia*, that, under s. 624 of the Code of Civil Procedure, no application could be made to the Officiating Judge for a new trial. The plaintiff contended that the sections in the Civil Procedure Code relating to reviews, which are made applicable to Courts of Small Causes, had virtually repealed s. 21 of Act XI of 1865, and that at any rate no new trial could be granted by a Small Cause Court Judge of a case tried by his predecessor unless upon the ground of some clerical error in the proceedings, or the discovery of some new and important matter or evidence.

Baboo *Saroda Churn Mitter* for the plaintiff.

Munshee *Serajul Islam* for the defendant.

The following judgments were delivered :—

GARTH, C. J.—As s. 21 of Act XI of 1865 has not been repealed or affected by the Civil Procedure Code, 1877, I am of opinion

* Reference, No. 12 of 1880, from Baboo Boloram Mullick, B.L., Officiating Judge of the Small Cause Court at Sealdah, dated the 8th May 1880.

that the provisions of that section are still in force with regard to applications for a new trial, and that they are not directly controlled in their operation by s. 624 of the Civil Procedure Code.

That the two procedures (*viz.*, the one for a new trial, and the other for review) are both still in force, has virtually been decided by Mr. Justice Jackson and Mr. Justice Tottenham in the Small Cause Court Reference, Nos. 69 and 70 of 1879.

At the same time I think it right to add that, having regard to the nature of the question referred to us, in my opinion any Small Cause Court Judge, in dealing with applications for a new trial under s. 21, is bound to observe and respect the manifest intention of s. 624, which is indeed only an enactment by the Legislature of the rule which had been previously laid down by this Court as a guide to the Judges of subordinate Courts when dealing on review with their predecessors' judgments: see *Ellem* v. *Basheer* (1) and *Roy Meghraj* v. *Beejoy Gobind Burral* (2).

It is to my mind manifestly improper for one Judge to review, or grant a new trial of, a case decided by his predecessor, where the alleged error consists in the determination of some question of law or fact upon which the one Judge has only the same materials and the same means of forming a satisfactory conclusion as the other.

I think that it would be quite as indecent under such circumstances for one Small Cause Court Judge to reverse a decision of his predecessor, as it would be for one Division Bench of a High Court, consisting of two Judges, to reverse the decision of another Division Bench of the same Court, also consisting of two Judges.

Our attention was directed during the argument to a case decided by the Privy Council in the year 1876—*Reasut Hossein* v. *Hadjee Abdoollah* (3); but the point now under consideration was not discussed or even alluded to in that case.

The question there arose was, whether one District Judge had jurisdiction to review the decision of his predecessor for any cause other than some positive and apparent error of law, or the

(1) I. L. R., 1 Calc., 184. (2) *Id.*, 197.

(3) I. L. R., 2 Calc. 131; S. C., L. R., 3 I. A., 221.

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discovery of new evidence; and their Lordships state in their judgment that, looking to the extreme generality of the terms used in ss. 376 to 378 of Act VIII of 1859, they were not prepared to say that one Judge had absolutely no jurisdiction to review the decision of his predecessor, whenever the parties failed to show that there was some positive error of law in the former judgment, or new evidence to be brought forward.

That case was decided upon the language of the Civil Procedure Code of 1859, which differs in some respects from that of the new Code, and in which, notably, there was no provision similar to that in s. 624.

This section seems to me to declare very plainly what the views of the Legislature are upon the point now under discussion.

It is very probable that, at the time when these review sections of the Civil Procedure Code were passed, the operation of s. 21 of the Act of 1865 did not receive sufficient attention.

As Small Cause Court cases in this country are tried, both as regards law and fact, by the Judge alone, it is difficult to conceive any reasons which would justify a new trial which would not also afford good grounds for a review; and if so, the principle, if not the actual provisions, of s. 624 ought to be applicable to new trials as well as to reviews.

Although, therefore, in this instance, the Small Cause Court Judge has jurisdiction, under the circumstances, to entertain the application for a new trial, I think that, in the exercise of that jurisdiction, he should be guided by the considerations to which I have referred.

MITTER, J.—I am also of opinion that the present Officiating Judge of the Court of Small Causes at Sealdah has jurisdiction to entertain an application for a new trial. As to the grounds upon which he should grant a new trial in the case out of which this reference has arisen, I express no opinion, as that is not one of the questions referred to us.