
(1873) 05 CAL CK 0008

Calcutta High Court

Case No: Special Appeal No. 957 of 1872

Bhyrub Chunder
Surmah Chowdhry and
Another

APPELLANT

Vs

Madhubram Surmah
Alias Madhub Chunder
Surmah and Others

RESPONDENT

Date of Decision: May 20, 1873

Judgement

Sir Richard Couch, Kt., C.J.

Now, in a special appeal, a decision passed in regular appeal may be questioned on the ground that there has been a substantial error or defect in law in the procedure or investigation of the case which may have produced error or defect in the decision of the case upon the merits. In this case the Judge of the lower Court allowed a review of a decision passed in regular appeal without any enquiry or proof that the new evidence was not within the knowledge of the applicant for the review at the hearing of the case, or could not be adduced by him when the decree was passed. It was admitted that this was so. S. 376, Act VIII of 1859, allows an application to be made for a review by any person who, from the discovery of new matter or evidence which was not within his knowledge, or could not be adduced by him at the time when the decree was passed, or from any other good and sufficient reason, may be desirous of obtaining a review of the judgment passed against him. In order that the Court may grant a review on the ground of the discovery of new matter or evidence, it must be such a case as is here described; and if a Court grants a review without its being shown that the evidence was not within the knowledge of the applicant, or could not be adduced by him when the decree was passed, it is an error in the procedure--it is granting a review when the law does not allow one to be granted,--granting it in a case which does not come within those specified in the section which allows an application to be made for a review.

2. It is true that in s. 378 the words of s. 376 are not repeated. It is said generally:--"If the Court shall be of opinion that there are not any sufficient grounds for a review, it shall

reject the application;" and if the applicant does not show any such grounds as are described in s. 376, that is to say, if the application is not supported by proof that there are such grounds, it ought to be rejected. It would not be proper for the Court to receive an application on account of the discovery of new evidence without having some proof of the truth of the allegation. In another part of s. 378 it is said that, "if it (the Court) shall be of opinion that the review desired is necessary to correct an evident error or omission, or is otherwise requisite for the ends of justice, the Court shall grant the review." But I do not think that this part of the section is applicable to the present case, because the application for a review was upon the specific ground of discovery of new evidence. It appears to me that the act of the lower Court in granting the review, as it did, without any evidence of the fact which was necessary to make the granting it allowable, was an error of law in the procedure which is a ground of appeal when the decision upon the review is brought before this Court in special appeal.

3. Then what is the effect of s. 378? It says that the order of the Court granting the review or rejecting the application shall be final. Is that to be read as controlling the right of special appeal to the extent that, when the decision upon the review is brought before the Court, it is not to take notice of the error in law in the procedure by granting the review and rehearing the case? It appears to me that, taking the sections together, we ought not to give such an effect as that to the word "final" It means there, as it does in some other parts of Act VIII, for instance in s. 257, that the order rejecting the application or granting the review shall not by itself be open to appeal. A person shall not be at liberty to go to the Appellate Court and contend that the Court which has refused or has granted a review ought not to have done so. But the word is not to be so construed that, when the decree in the suit has been made, the legality of the order granting the review shall not be in any way questioned; that, although the review may have been illegally granted, no question about it shall be allowed to be raised, and a person who had a decree in his favor shall not be at liberty to show that he was illegally deprived of the benefit of it by the Court granting a review, where the law has not said that a review may be granted to a person who merely said that he had discovered fresh evidence, but did not bring himself within the provisions of the law which says that the discovery shall be of evidence "which was not within his knowledge, or could not be adduced by him at the time when the decree was passed."

4. I think that is the construction which we ought to put upon these words in s. 378, and that it is proper that the parties in a special appeal shall be at liberty to show that there has been an error or defect in the procedure by the granting of the review which has affected the decision of the case upon its merits, by producing a different decision from what had been before come to.

Jackson, J.

5. I am of the same opinion. In the state of the law before the CPC was enacted, it was not competent to the inferior Courts in Bengal to review their own judgments without the

sanction of the superior Courts. By s. 376 (Civil Procedure Code), all Civil Courts were empowered to review their judgments for any of the Causes set forth in that section, one of them being "the discovery of new matter or evidence which was not within his (the applicant's) knowledge, or could not be adduced by him at the time when the decree was passed against him." This seems to be a specific cause on which a party aggrieved by a decree is entitled to apply for a review of such decree. I think that, in respect of that cause, the power of the Court to grant a review is specially limited by the words of that section. Then s. 378 declares that the order of the Court whether granting or rejecting the review "shall be final." That seems to me to bring the order into the position of an interlocutory order within the meaning of s. 363, that is to say, that it is an order not of itself appealable, but which "may be set forth as a ground of objection in the memorandum of appeal," if, in pursuance of the admission of a review of judgment, a decree be passed against the party against whom the review is granted.

6. I quite concur, therefore, in thinking that, although an order granting a review cannot be made the subject of appeal standing alone, yet the Appellate Court can take notice of it in special appeal, and if the review was improperly granted, can set aside the judgment passed in furtherance of such review.

Phear, J.

7. I concur generally in what has been said by the Chief Justice. It has, on several former occasions, fallen to me to express my views on this matter of review under the CPC of this country, and those views are reported in more than one of the cases which have been referred to. I do not, therefore, think it necessary to add anything to what has already been stated very fully by the Chief Justice. It seems to me that we ought to answer the question which has been referred to us in these words:--The orders of the Subordinate Judge granting a review can be questioned in special appeal.