(1868) 06 CAL CK 0018

Calcutta High Court

Case No: Regular Appeal Nos. 158 and 178 of 1868

Raja Syud Enaet Hossein		APPELLANT
	Vs	
Rani Roushun Jehan Rani Roushun Jehan Vs Raja Syud Enaet Hossein		RESPONDENT

Date of Decision: June 8, 1868

Judgement

Sir Barnes Peacock, Kt., C.J.
The first question is, whether an order made by this Court on an application to review its Judgment, in a case of appeal, is an "order made on appeal" within clause 39 of the Court"s Charter, so as to enable the Court to admit an appeal against such order to Her Majesty in Council. The question whether an order of this kind would fall within the words of the 2nd part of section 39 of the Charter as an order made on appeal or otherwise, is not raised. The question raised is a very important one, inasmuch as, if an order of this nature is an appealable order, the time for appealing against it to Her Majesty in Council would be reckoned from the time of the order and not from the time of the original decree; and thus a party, by making a fruitless application for review, and getting that application refused, might, by aside wind, appeal against a decree long after the time for appealing against it had expired. It would be impossible for the Privy Council upon appeal against an, order rejecting a review, to decide whether that order was right or wrong without themselves reviewing the judgment.

2. In Maharaja Maheshwar Sing v. The Bengal Government 7 Moor I.A. 804 it was said by their Lordships of the Privy Council,--" It must be borne in mind that a review "is perfectly distinct from an appeal. It is quite clear from the Regulation "that the primary intension of granting a review was a re-consideration of the same subject by the same Judge as contra distinguished from an appeal which "is a hearing before another tribunal." But it is contended that an order rejecting a review, though not an order made on appeal against the judgment to be reviewed, is an order made on appeal, inasmuch as

it is ah order in the appeal in which the judgment sought to be reviewed was given, and that the words "made on appeal" in the 1st part of section 39 of the Charter must be read as if they had been "made in the exercise of appellate jurisdiction." It appears to me, however, that that was not the intention of the Letters Patent. If it had been so, the natural and more easy mode of expressing that intention would have been to use the words "from any final judgment, decree, or order of the said High Court, made in the exercise of appellate jurisdiction," I think that by using the words "made on appeal," the framers of the Letters Patent did not intend that the words used should have that effect. - If the words "made on appeal" had been intended to mean "made in the exercise of its appellate jurisdiction," as contra-distinguished from the exercise of its original jurisdiction, any order made by the Court in a matter which came before it otherwise than in its original jurisdiction, would be the subject "of" ah appeal to Her Majesty in Council. It is just as discretionary with the Court to reject an application for a review of its judgment, as it would be to reject an application for liberty to appeal to Her Majesty in Council against a decree in which the amount involved is less than 10,000 Rupees. If the one is an order on appeal, it appears to me that the other would be so; and if an appeal would lie to Her Majesty in Council against the one, it would also lie against the other. Suppose an order rejecting an application for review is appealable, could the Privy Council direct the Judges of the High Court, who formed the Division Bench which pronounced the judgment, to review their judgment, notwithstanding section 378 of the Code of Civil Procedure, [1] which says that if the Court shall be of opinion that there are not any sufficient grounds for a review, it shall reject the application, and its order shall be final? The Judicial Committee are as much bound by that enactment as they are by an Act of the Imperial Parliament.

3. It is contended that inconvenience may arise if an appeal will not lie to Her Majesty in Council from such an order; but it appears to me that this is not the case. If the application for review is upon a matter of law, the Privy Council can do all that is necessary upon an appeal against the judgment, either by reversing or modifying the decree, or by remanding the case to the Court which passed the decree for further adjudication. If the ground for review is the discovery of new matter of evidence, which was not within the knowledge of the parties when the decree was passed, an application can be made to the Privy Council, upon the hearing of an appeal against the decree, either to take fresh evidence itself, or to remit the case to this Court, with directions to take the fresh evidence.

4. In Juveer Bhaee and Others vs. Vuruj Bhaee and Others ., in which the Judge of a lower Court had suppressed certain important documents, which had been proved before him, so that the Sudder Court never had an opportunity of exercising its Judgment upon them, but the documents were afterwards obtained and laid before the Judicial Committee; that tribunal ordered that the case should be remitted to the Sudder Court, with a direction that it should take those documents into consideration, and investigate the matters therein alleged, as to it might seem best. See Macpherson''s Privy Council,

124. So the Privy Council has all the powers upon appeal against the original decree, that are necessary to do complete justice.

5. For these reasons, in addition to those which I expressed in the Full Bench Case, Saudamini Dasi v. Maharaj Dhiraj Mahatab Chand Bahadoor Case 850 of 1865, 11th September 1866. , I am of opinion, after re-consideration, that the judgment which I then expressed is correct; and that an order rejecting a review of judgment is not an order made on appeal within the meaning of the 39th section of the Letters Patent; and I think that we should entirely frustrate the object of the rule, which requires an appeal to be preferred within a limited time, if we held that the same object might be obtained by appealing against an order rejecting an application for review, however long after the decree had been made.

6. The second question is whether in cases where an appeal has been lodged and admitted against a decree made in appeal, the Court ought not, generally speaking, when it transmits the proceedings connected therewith, also to send such proceedings as applications for review of the judgment, and the order of the Court thereon.

7. It appears to me that those proceedings ought not to be sent. They are not proceedings in the case appealed to Her Majesty in Council. The judgment and decree are the matters appealed; the proceedings with reference to the application for review are matters which take place subsequently, and this is made perfectly clear by the 42nd section of the Charter, which directs that a copy of all evidence, proceedings, Ac, are to be transmitted, so far as the same have relation to the matters of appeal.

8. If it be important for the appellant to bring to the notice of the Privy Council that he made a fruitless application for a review, as suggested in argument, that matter can be brought before them by affidavit, if the appellant thinks proper to do so.

9. Macpherson and Mitter, JJ.--concurred.

L.S. Jackson, J.

10. Upon the second of the two questions which I referred for the consideration of the Full Bench, I desire now to state, unreservedly, that my present opinion is, that my first impression was erroneous, and that parties would not be entitled to have the subsequent proceedings transmitted to England. Upon the first question, I feel bound to admit the force of the reasons by which the Chief Justice has supported his judgment; and, therefore, on this point, although my own mind is not yet free from doubt, I do not wish expressly to dissent from the conclusion in which my learned colleagues are agreed. I will only make this one observation, that, in considering and referring this question, I own that I had mainly in view the case of an unsuccessful party, who made application for a review of judgment upon the ground of a discovery of fresh evidence, and I wish to draw attention to the inconvenience, as it seems to me, which results from denoting by the one term "review" in section 376 of the Code of Civil Procedure,[2] what appears to me to be

two very distinct things, viz., the re-consideration of a case as it originally stood, upon the ground of an alleged error upon a point of law, or in respect of the weight of evidence; and on the other hand, the re-hearing of a case on additional evidence, on the application of one or other of the parties to the ease, which is in fact the hearing of a new case. It appears to me that the inclusion of these two different things in the single term "review of judgment" tends very much to complicate questions connected with that kind of proceeding.

---

[1][Sec. 378--If the Court shall be of opinion that there are not any sufficient grounds for a review, it shall reject the application, but if it 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, and its order, in either case, whether for rejecting the application or granting the review shall be final, Provided that no review of judgment shall be granted without previous notice to the opposite party to enable him to appear and be heard in support of the decree of which a review is solicited].

The order of the Court for granting or refusing the review is final.

Proviso.

[2][Sec. 376:--Any person considering himself aggrieved by a decree of a Court of Original Jurisdiction, from which no appeal shall have been preferred to a Superior Court--or by a decree of a District Court in appeal, from which no special appeal shall have been admitted by the Sadder Court--or by a decree of the Sadder Court from which either no appeal may

Review of judgment