(1866) 02 CAL CK 0013

Calcutta High Court

Case No: Application for Reviews Nos. 24 and 25 of 1865

Bani Madhab Ghose		APPELLANT
	Vs	
Ganga Gobind Mandal Nasiruddin Khan Vs Indronarayan Chowdhry		RESPONDENT

Date of Decision: Feb. 1, 1866

Judgement

Sir Barnes Peacock, Kt., C.J.
The question which has been submitted for the opinion of a Full Bench is whether an application for the review of an order rejecting a previous application for review can be entertained by the Court, or whether the order made upon the first application for rejecting the review is final and binding upon the Court which formerly rejected it. The answer depends upon the proper construction to be put on Act VIII of 1859, s. 376, and the other sections of Chapter XI. The question, although it arises upon an order for rejecting a review, must also be considered in other points of view, because, whatever is the proper construction of s. 378 with reference to an order for rejection, appears also to be the proper construction with reference to an order for admitting a review, and to a judgment given after such admission. The words areï¿½"and its order in either case, whether for rejecting the application or granting the review, shall be final." The words "shall be final" apply not only to an order for rejection, but also to an order for granting the application. I will therefore consider the case in four different points of view. 1st.--When an application for review is dismissed upon default of the applicant. 2nd.--When the application for review is admitted, and the judgment is altered on rehearing. 3rd.--When the application is admitted and the judgment is not altered on rehearing. 4th.--When there is an order for rejecting the application.

2. Although the question now before us has reference to an order for rejection, I think the case will be made more clear if, before we deal with the question as regards an order for rejection, we consider the case in the other points of view which I have mentioned. 1st.--I shall consider an order of dismissal on the ground of default of the applicant. S. 376, Act

VIII of 1859 (the first section of Chapter XI) states when an application for review may be made. It enacts that:-- "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 Sudder Court, * * * * * and 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 such decree was passed, or from any other good and sufficient reason, may be desirous of obtaining a review of the judgment passed against him, may apply for a review of judgment by the Court which passed the decree." S. 377 enacts:-- "That the application shall be made within ninety days from the date of the decree, unless the party preferring the same shall be able to show just and reasonable cause, to the satisfaction of the Court, for not having preferred such application within the limited period." Then comes the section upon which the case turns. S. 378 says:-- "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." That section applies only to two cases: 1st, when the Court is of opinion that there are not sufficient grounds for granting the application; and 2nd, when the review is granted. No express provision is made by that or any other section for the case of the dismissal of an application, for default of an applicant who fails to appear on the day appointed for hearing the application, and who afterwards comes forward and satisfies the Court that there was good excuse for his non-appearance. As the point is not provided for by the Act, there is nothing, one way or the other, to show whether the order of dismissal is final or not. It appears to me that the Court would have the power to re-admit the application upon grounds similar to those laid down in s. 347, for the re-admission of an appeal dismissed for default. That section says:-- "If an appeal be dismissed for default of prosecution, the appellant may, within thirty days from the date of the dismissal, apply to the Appellate Court for the re-admission of the appeal; and if it shall be proved, to the satisfaction of the Court, that the appellant was prevented by any sufficient cause from appearing when the appeal was called on for hearing, the Court may re-admit the appeal." By parity of reasoning, I think that if an application for review is dismissed for default, and the party can satisfy the Court that he was prevented by any sufficient cause from appearing on the day fixed for hearing the application, the Court may re-admit the application. I would not say that the application for re-admission should be made within thirty days, because there is no express enactment to that effect, but I would allow it to be re-admitted, on sufficient cause shown, within such time as the Court may deem reasonable.

3. 2ndly.--I come to the case when the application for review is admitted and the judgment is altered on rehearing. If the Court admits the review, there must be a rehearing. S. 380 enacts that "When on application for a review of judgment is granted, a note thereof shall be made in the register of suits or appeals (as the case may be), and

the Court shall give such order, in regard to the rehearing of the suit, as it may deem proper in the circumstances of the case." Now, upon a rehearing, I apprehend there must be a fresh judgment, and a fresh decree according to the new judgment; and it appears to me only reasonable, just, and proper that when a new judgment is given, altering the former judgment, the opposite party should have an opportunity of applying for a review of that judgment. Suppose upon a rehearing upon a review, a decree for the plaintiff should be altered, and a decree given for defendant, the plaintiff would have a right to appeal against the new decree, and the time for appealing would be reckoned, not from the time of the original judgment, but from the time of the new judgment. If an appeal would lie from the new judgment, there can be no reason why an application for reviewing it should not be allowed. Suppose a judgment originally given in favor of the plaintiff should, upon review and the admission of newly discovered evidence, be given for the defendant, and suppose that after the judgment in review the plaintiff should discover new evidence, there is no reason why he should not obtain a review of the second judgment; nor is there anything in s. 376 to show that it ought not to be granted.

4. 3rdly.--When the review is admitted and the judgment is not altered on rehearing. Upon this point, it must be remarked, that, after the admission of review, there must always be a rehearing and a new judgment, whether the judgment be in accordance with or different from the original judgment. If it is a new judgment, it is so as regards an appeal and the time for appealing, and also as regards an application for a review.

5. 4thly.--When there is an order for rejecting the application. I think that an order for rejection is not absolutely final, and that it is in the judicial discretion of the Court to say that notwithstanding it has rejected the application on one ground, it is not precluded from admitting it upon another ground. It may happen that, after a review has been rejected on a point of law, new evidence may be discovered, which was not within the knowledge of the applicant at the original hearing, or at the time of the rehearing on review; surely there is no reason for refusing to admit a review upon the ground of the new evidence, simply because it has been rejected upon a point of law, if the Court thinks that a review is necessary for the ends of justice.

6. In construing an Act it is always right to look at the consequences of the decision, for the purpose of ascertaining the intention of the Legislature. If a particular construction would lead to inconvenience, it may fairly he supposed that the construction is not in accordance with the intention of the Legislature in cases in which the words used are susceptible of a different construction. In the present case, I am of opinion that the words "shall be final" in s. 378 are used with reference to appeal; that is to say, that no appeal shall lie from an order of rejection, upon the ground that a review ought to have been admitted, or vice versa. I do not think that any inconvenience will arise from this construction, if applications for review be confined to their legitimate object; whereas injustice might be done if a different construction were put upon the words.

7. On several occasions applications for review have been made before me upon grounds which showed a great misapprehension of the real object of a review. The late Sudder Court, in a decision to which my attention has been called by Bayley J. Juggudumba, Debea v. Muneeruth Mookerjee, S.D.A. Rep., Sept. 25, 1858, p. 1539, rejected an "application for review, upon the ground that the suit, which altogether depended upon a question of fact, had been disposed of after due consideration of the evidence; and that the objection urged in the petition of review, as to the weight attached by the Court to that evidence, was not a sufficient ground for admitting the review." I have called attention to this case, because I have on more than one occasion observed that an attempt was made to obtain a review of judgment, upon the ground that, upon the first hearing, the Court had determined the facts contrary to the weight of evidence. This is a matter for appeal, not for a review. But the attempt has frequently been made for the purpose of having the case re-argued by fresh Counsel, when parties have been dissatisfied with the first decision. It appears to me that the question which has been propounded to us ought to be answered by stating that an order rejecting a review is not conclusive, and that the Court may, in the exercise of its discretion, admit a review even after a prior order rejecting it.

8. The case will go back to the Divisional Court which referred the question, in order that it may be determined by them.

Bayley, J.

9. I am of the same opinion, and think that there is nothing in the law which prohibits a second application for a review of the order rejecting the first one. I would add, with reference to the judgment in Juggudumba Debea v. Muneeruth Mookerjee S.D.A. Rep. for 1858, p. 1539 that I think now, as I did then, that the law never contemplated, and our practice never sanctioned, those applications for review which are simply and solely to serve the mere purpose of a re-argument by new Counsel of the former case, on the facts and points of law before duly considered and adjudicated.

Pundit, J.

10. I agree with the Chief Justice.

Macpherson, J.

11. I concur in the judgment of the Chief Justice. I shall only add that, as a general rule, no second or other subsequent application for review should be granted, except under special circumstances. Such application should not, in my opinion (save in very exceptional cases), be granted on the ground of any question of fact or of law which has been, or might have been, brought before the Court in any previous application for review.

Seton-Karr, J.

12. I concur with the learned Chief Justice in thinking that we should look, in such cases, to the probable or possible consequences of our acts, but I also think that we are bound to look to the whole spirit of our Legislature, to the temperament of the people, and to the character and complexion of the cases which crowd our Courts. This is especially necessary in a case where the wording of the law may give rise to different interpretations. We may then fairly look to the spirit and intent of the Legislature. Most heartily, too, do I agree with what has fallen from the Chief Justice, as to the principles on which reviews should be entertained. I wholly condemn the pernicious practice which is constantly attempted to be introduced, of endeavouring to get a case, not reviewed, but entirely reheard on the same grounds, facts and evidence, by different pleaders from those who argued the case at the original appeal. Such could never have been the object of the Legislature in providing for reviews.

13. The Chief Justice has delivered his judgment with reference to four points. I have considered the subject with reference to the three questions which were argued consecutively by Mr. Twidale, but I believe that my remarks will be found to embrace the whole subject which has been raised before us.

14. The points, which have been argued are, then, in order of argument, as follows:--1st.--Can a second application for a review of judgment be admitted after the first has been rejected? 2nd.--Can an application for review of judgment be readmitted after it has once been dismissed for default by the absence of the pleader or the appellant, the dismissal not having been on the merits? 3rd.--Can an application for review be admitted or entertained of any order passed, when an application for review has been actually granted, whether the new order in review confirms, modifies or reverses the original judgment in appeal?

15. As regards the first point, I hold that the order of a Civil Court rejecting an application for review is final, in the sense that such order is conclusive, not only on the particular point then raised, but absolutely conclusive against any further steps in the Court which passes such order. The words of the law seem to me sufficiently clear and positive on this head. Cases have indeed been shown to us to prove that such reviews of reviews, or rather such second applications when the first had failed, had been entertained by the late Sudder Court, and, on one or two occasions, by Divisional Benches of our Court. But what we have to look to is not past practice under either the old or the present law, but the legality of such a practice under the Code which we are bound to interpret and administer; and I am forced to the conclusion that both the letter and the spirit of s. 378, Act VIII of 1859, are against the admission of any such second application. The letter of the law cannot, it seems to me, as has been contended, apply to possible appeals, or to the mere finality of the order itself, passed on some particular point pressed on the Court at the time. We are scarcely warranted I think in interpreting the law to mean that an order is final in one particular sense and not final in another. Our Legislators in 1859 used language with reference to its fair and ordinary construction.

16. Had what is contended for been the intent of the law, it would, I think, have discriminated and would have said, "final and not subject to appeal," or would have used additional words to illustrate its meaning. But the finality intended is, to my mind; evidently that of the Court itself passing the order of rejection. As regards the spirit of the law and the intent of the Legislature, the conclusion seems to me equally unavoidable. Once admit a second application after a first had failed, and there is no reason why ten, twenty, or even endless applications should not be made on new points of law, or on the alleged discovery of new evidence. The pleader, who contended for this second application, admitted that this was the fair, logical and inevitable deduction from his contention. If we rule that the first rejection is not final and conclusive, according to the ordinary interpretation of language, there may be literally no conceivable limit to fresh applications made by wealthy, determined, and litigious clients. On this point then, I hold that an order of a Civil Court rejecting an application for review puts an end to everything as far as that Court itself is concerned.

17. On the second point, I am glad to think that there is no material division of opinion. We may reasonably and lawfully in the spirit of the Code, and without violating or altering its letter, apply to reviews the provisions of ss. 346 and 347, which relate to appeals dismissed for default. If the application for review be dismissed for default, because the appellant does not appear in person or by a pleader, he may be allowed to apply within thirty days for the read mission of the review. The application has not been heard on the merits, and s. 378 would not apply until it had been so heard. But I would strictly limit this period to the thirty days mentioned in the above sections. It is as regards the third point that I feel great difficulty and doubt, and that I think it necessary to explain my views at some length.

18. My learned colleagues, I understand, are of opinion that when a review is once granted, and not rejected, the case from that time assumes a different phase, and that, whether the original order of the Court be affirmed, or be modified or reversed, the order passed after the review is granted becomes a new order or judgment. The case, it is said, is not merely reviewed, it is reheard and a fresh judgment follows, to which the ordinary rules of pleadings apply. A review of such a judgment passed on the discovery of the new matter or evidence not within the knowledge of the party, or on other good and sufficient cause, as contemplated in s. 376, would, consequently, be an entirely distinct and separate judgment of which a review might be granted in ordinary course, as if the first proceedings had been wholly obliterated and nullified. After very careful consideration, I own that I am unable to find such a conclusive warrant for any such proceeding in the sections of the law as to satisfy me that this can be the correct judicial practice of the Court. The chapter on reviews is very short, and consists only of five sections. The first sectionï¿½376--explains for what "a review of judgment by the Court which passed the decree" may be granted, being new matter or evidence not within the knowledge of the party, or "any good and sufficient reason." The next section relates to the time prescribed for filing such applications and to the stamp required, and does not bear on the point

before us. The third section--378--says that "if the Court shall be of opinion that the review is desired to correct an evident error or omission, ... the Court shall grant the review and its order in either case, whether for rejecting the application or granting the review, shall be final." The next section--379--merely prescribes that the application for review must be made to the Judge or Judges who passed the decree, if he or they are not "precluded by absence or other cause for a period of six months after the application from considering the judgment to which the application refers." And the last section--380--prescribes that "when an application for review of judgment is granted, a note thereof shall be mode in the register of suits or appeals (as the case may be), and the Court shall give such order in regard to the rehearing of the suit as it may deem proper in the circumstances of the case."

19. It is, I understand, on the words of ss. 378 and 380, taken together, that the argument for considering an order passed when an application for review has been granted to be a new order or a new judgment mainly depends. It was argued by the pleader for the respondent, against the view taken by Mr. Twidale, that an order of rejection of an application was final, while an order granting a review might be open to further consideration. I confess that I do not see any way at present to any division of s. 378 into two distinct clauses or provisions, one of which shall prescribe that the order rejecting the review shall be final, while the other shall mean that when a review has been granted and a rehearing takes place, as contemplated in s. 380, the order shall not be final, but shall again be open to a fresh review. It is true that the difficulty which I feel is attempted to be met by an argument that "granting the review" and "rehearing the suit," which are the words used in ss. 378 and 380, respectively, relate not to one operation, but to two distinct operations. But I cannot think that the law contemplated any such distinction, or that it intended that the order, when once admitted to review, should be looked on as a new order, whether it endorsed, or whether it reversed or altered the old order. S. 378 talks of the "review," that is the rehearing and reconsideration, being necessary to "correct an evident error or omission." But by correction of an error or omission, a new judgment, such as my colleagues contemplated, would at once start into existence. And yet in the very same section we are told that this very order for "granting the review," and consequently, so I argue, for correcting the error or admission, is final. Again, if the new order affirmed the old order or judgment, then, practically and to all effects, there would be no new order at all. The case would be the same case, with the same interests between the same parties, and with precisely the same results. The old order would not, as I understand it, have been wiped out, but would be merely reaffirmed with the additional weight and strength which the fresh arguments, the new view of the law, or the additional evidence lent to the winning side. In many instances the confirmation of the old order would necessarily be brief and terse. It would be in the old order that the main exposition of the reasons for the conclusion of the Judge would be found. How could it be then said that the new order of ten or twenty lines superseded the elaborate previous judgment of several pages? If, on the other hand, the new order should take the form of either reversing or modifying the old order, still it would, in my opinion, amount to nothing

more than the "review of judgment" contemplated in the first section of the chapter--s. 376--which would have been granted on the discovery of new matter or evidence, or for some good and sufficient reason. Then, again, when we look into s. 378, I find myself, as I said, unable to draw the distinction between the finality intended to be applied to rejections of application, and the finality of orders granting the review, which review had become necessary to correct an evident error or omission. The Legislature contemplated both contingencies, and provided for them both by making the orders final.

20. We seem agreed that to admit fresh applications after the first had been rejected may be inconvenient if largely resorted to and not checked. Reading the whole chapter together and considering its language and object, I find myself unable to draw any other inference than that the law intended to put an end to all such litigation. In special appeals the rejection of a review would be the fourth time of hearing, without making an allowance for remands. In regular appeals it would be the third time of hearing. What more did the exigencies of litigation require, or the law-makers intend to supply? I admit that there is something which may be taken to favor the opposite view in the words "rehearing of the suit," used in the last section of the chapter; but they are not sufficiently clear and explicit to satisfy me that it was the deliberate intention of the Legislature, with its eyes open to the prevalence of litigation, and looking to the ends of justice, that, when a review had been granted for the reasons prescribed by law, the whole case should once more be opened to review. Litigation in this view might be more endless, harassing, and uncertain than ever, and it is a well-known and a long established legal maxim tested by experience, consonant to reason, and sanctioned by the highest legal authorities, that, in the interests of the State, there should be some end of litigation. This maxim acquires treble weight and force in this country. If the opposite doctrines now contended for be adopted, it is perfectly possible that we may see a train of litigation just such as the following. A plaintiff, after a local investigation and a long contest, obtains a decree in a case of chur land or accretion in the Zilla Court. The decree is afterwards reversed in appeal by the High Court, and judgment is entered for the defendant. The plaintiff then discovers a new map, or other important document, which would entirely alter the whole aspect of the case, and files an application for review. The review is granted, and the case is reheard by the light of the additional evidence and with argument reinforcing argument. After a long hearing, in which appear different Pleaders or Counsel from those who argued the case at the appeal, the original decision is set aside, and the accreted land is given to the plaintiff. This being treated as a fresh decision, with which the first judgment had nothing whatever to do, the defendant then applies in his turn for a review on the ground that the Court had wholly misread or misinterpreted the law of accretion; a review is granted, the second decision on the fresh evidence is after due formalities set aside on a law point; and we have a third decision which, after all, is not in any way final in place of the two others. Where, I earnestly ask, is this litigious spirit to stop, or to what security are litigants to look? When I remember the eager zest and animosity which we see so constantly displayed by wealthy, pertinacious, or unscrupulous litigants in this country, I must be clearly satisfied of the intention of the Legislature and of the precise

directions of the law before I can consent to sign or endorse any ruling which, though only on particular occasions, may be followed by consequences not in keeping with that certainty and definitiveness of judicial administration which is the avowed aim of those who make, and of those who administer, the law in Bengal. The cases pat by the Chief Justice might involve hardship, but hard cases make bad law, and I must consider, not the discretion of the Court in such hard cases, but the policy of the State and the general effect on litigation. The word "rehearing" used in the last section of the chapter, on which stress is laid, appears to me inserted merely in order that the Court which has admitted the review, may either then and there reverse its first order, or not to take the respondent by surprise, if new evidence has been filed may put off the hearing, and the review or reversal of its own order to some future day. And I do not see any real difference between the review of ss. 376 and 378, and the rehearing of s. 380. There is, no doubt, some little difficulty as to the appeals from orders on reviews which alter former orders, but this is not conclusive, and it may be a casus omissus of the Legislature. It may be that from an order in review which modified or reversed a former order an appeal would lie to the Appellate Court, though a fresh review of that second order ought not to be admitted in the same Court. Such an appeal, though not distinctly provided for in the chapter on reviews, ought to be, and would be, admitted on the principle which governs appeals in ordinary cases. But when the case in any one Court had been decided twice in favor of the plaintiff or the defendant, or once in favor of the plaintiff, and once in that of the defendant, I should certainly say that in that Court the case had been sufficiently heard. If the second order reaffirmed the first, then an appeal from the first order would be all that was necessary. If the second altered or reversed the first order, then an appeal ought to lie from the altering or reversing order. I am also able to perceive a clear distinction between cases in which a Court passes a preliminary judgment on a point of law, without going into the merits, as follows:--A Court dismisses a suit either in the first instance or in appeal, because the plaintiff is barred by limitation, or has no locus standi in Court. A review is afterwards granted, on the ground that the ruling in law is wrong. This review being admitted, is, to my thinking, final, but the case when so reviewed may of course be heard on the merits in the same Court, simply because those merits had never been enquired into at all. According to the view taken by my colleagues, the order of review, admitting that the plaintiff was not barred and had a locus standi, would not be final, and it would be the interest of the defendant to pray for review of review, in endless succession, in order to harass and keep the plaintiff out of Court, and prevent his case being heard on the merits. It would be easy to multiply instances of this kind, which I conceive would not conduce to the good administration of justice. I should have had much greater pleasure had I either been able to agree with my learned colleagues, or had they thought fit to take up my view of the question, and I can most sincerely and conscientiously say that I dissent from them with great respect for their varied talents and long judicial experience. But I have thought it absolutely essential to explain my own views and to scrutinise the law narrowly, as the point raised is one which appears to me to be one involving an important principle. If my arguments appear partial, strained, or likely to work injustice, then the decision of my learned colleagues will only thereby derive additional weight and

authority, because the opposite view will have been set out with such ability as I can bring to bear on the subject. The result is, that I would answer the first and third questions in the negative, and the second in the affirmative.