

(1946) 06 CAL CK 0002
In the Calcutta High Court
Case No : Full Bench Ref. No. 1 of 1942

Sm. Sarajubala Guha and another

APPELLANT

Vs

Aswini Kumar Ghosh, Principal Defendant and others

RESPONDENT

Date of Decision : 14-06-1946

Acts Referred:

Citation : (1946) 06 CAL CK 0002

Final Decision : Allowed

Judgement

Chakravartti, J.—Before the 1st CPC was enacted, inferior Courts in India had no power to review their judgments, except with the sanction of superior Courts. The Code of 1859 for the first time provided by S. 876, that a person aggrieved by a decree of a Court of "original jurisdiction", might apply for a review of judgment on the ground of discovery of new matter or evidence or for any other good and sufficient cause, and by S. 378 it was enacted that a review might be granted, if the Court considered it necessary for correcting an evident error or omission, or otherwise requisite for the ends of justice. It was provided at the same time that the order of the Court, whether granting the review or rejecting the application, "shall be final". In the year 1878, it was held by a Full Bench of this Court in 20 W.R. 84 Dhyrub Chunder Surmah Chowdhury v. Madhub Ram Surmah ("73) 11 Beng. L. R. 428 : 20 W. R. 84 (F. B.) that the finality of the order was not absolute and only meant that it could not be appealed from as an order, but objections to it could always be taken in an appeal from the final decree. Presumably, the position created by this ruling was considered unsatisfactory, for, if the order could not be appealed from immediately, but could yet be objected to in an appeal from the final decree, an unnecessary waste of time and money would occur in case where, in such appeal, the order was held to have been wrongly made. The Code of 1877 met the situation in two ways. It continued to provide that an order rejecting an application for review, shall be final, but as regards an order granting an application, it specified certain grounds of objection which could be taken either by an immediate appeal from the order or in an appeal from the decree passed on review. The provisions

relating to review were also recast in several other ways. The Code of 1882 re-enacted the provisions of the Code of 1877 in exactly the same form, even the numbers of the relevant sections being the same. The provision relating to appeal was expressed in the following language:

629, An order of the Court for rejecting the application shall be final; but whenever such application is admitted, the admission may be objected to on the ground that it was (a) in contravention of the provisions of S. 624, (b) in contravention of the provisions of section 626, or

(c) after the expiration of the period of limitation prescribed therefor and without sufficient cause. Such objection may be made at once by an appeal against the order granting the application or may be taken in any appeal against the final decree or order made in the suit.

2. Apart from the provision contained in the last part of the section, the Code did not give any right of appeal from an order, granting an application for review. The Code of 1908, by O. 47, R. 7, practically re-enacted the provisions of S. 629 of the Code of 1862, but some alteration was made in the language. It reads thus:

7. (1) An order of the Court rejecting an application shall not be applicable, but an order granting an application may be objected to on the ground that the application was- (a) in contravention of the provisions of R. 2, (b) in contravention of the provisions of R. 4, or

(c) after the expiration of the period of limitation prescribed therefore and without sufficient cause.

Such objection may be taken at once by an appeal from the order granting the application or in any appeal from the final decree or order passed or made in the suit.

3. Rule 2, O. 47 corresponds to S. 624 of the Code of 1882 and R. 4 corresponds to S. 626; but it will be noticed that while the Code of 1882 provided that when an application for review was admitted, the admission might be objected on the ground that it contravened S. 624 or S. 626 or had been made after expiry of the period of limitation, the Code of 1908 provides that an order granting the application may be objected to on the ground that the application contravened R. 2 or R. 4, O. 47 or was made after expiry of the period of limitation. Another change introduced by the Code of 1908 was that apart from the provision contained in the last part of O. 47, R. 7, a right of appeal from an order granting an application for review was given in a general and unqualified manner by S. 104 (1) (i), read with O. 43, R. 1 (w). Those provisions stand as follows:

104 (1) An appeal shall lie from the following orders, and save as otherwise provided in the body of this Code or by any law for the time being in force, from no others:- * * * * *

(i) any order made under rules from which an appeal is expressly allowed by the rules.

O. XLIII "(1) An appeal shall lie from the following orders under the provisions of S. 104, namely:-

(w) an order under Rule 4 of Order XLVII granting an application for review.

4. Two other provisions in the Code of 1908 may in this connection be referred to: first, S. 96, which gives an unqualified, right of appeal from every decree passed by a Court exercising original jurisdiction, except when expressly barred; and secondly, S. 100, which gives a right of appeal from a decree of a first appellate Court on the ground that the decision is contrary to law or vitiated by a substantial error or defect in the procedure. The point for decision in the present case is whether, when an order granting an application for review is questioned in an appeal from the decree ultimately passed, the appellant is limited to the grounds specified in O. 47, R. 7 or is entitled to show that none of the grounds for review, as specified in R. 1 existed. The question arises out of the following facts. By a kobala dated 4-8-1912 Sarala Sundari, mother of the plaintiffs, purchased from certain Das's three properties, the howla which is the subject-matter of the present suit, a kayemi karsha tenancy and a Brahmottar. On 14-2-1920, defendant 1 purchased the howla in execution of a money decree obtained by him against the Das's. Thereafter he brought a suit for rent against defendants 2 to 7, who are tenants under the howla, and obtained an ex parte decree on 4-8-1930. In order to remove the cloud thus cast on their title, the plaintiffs commenced the present suit on 21-6-1935, asking for a declaration of their title and confirmation of possession through defendants 2 to 7, rent for a certain period and, in the alternative, damages. The tenant defendants did not contest the suit, but defendant 1 set up the plea that the alleged purchase by the plaintiffs' mother was a benami transaction and she was a mere benamdar of her vendors. In support of this plea, reliance was placed upon a judgment in a previous suit (Exs. J.) which defendant 1, as the landlord of the kayemi karsha had brought against the Das's for rent of that tenancy and in which the defence of a transfer to Sarala Sundari by the same conveyance was said to have been repelled on the finding that the alleged transfer was a benami transaction.

5. The trial Court held that the sale to the plaintiffs' mother was a genuine sale and decreed the suit. An appeal by defendant 1 was dismissed. But, thereafter, he made an application for review of the appellate judgment on the ground of discovery of fresh evidence as also on the extraordinary ground that in holding against his contention, the Court had not paid due regard to the findings in Ex. J. Notices of this application were directed to be issued by the learned Judge who had heard the appeal, but it came up for disposal before his successor. That learned Judge was not prepared to grant a review on the ground that fresh evidence had been discovered, but he granted it on the ground that Ex. J. had

not been "fully considered in the appellate judgment" and that, therefore, "the appeal should deserve to be re-opened and held again". He heard it in due course, gave to Ex. J. the full consideration to which, according to him, it was entitled and dismissed the plaintiffs' suit on the finding that the Kobala in favour of their mother was a benami document. Against that decision, the present second appeal was preferred by the plaintiffs. It came up for hearing before Akram and Pal JJ., when it was contended on behalf of the appellants that the ground on which a review had been granted was not a proper ground of review under the Code and that, therefore, the original judgment should be restored. The contesting Respondent did not dispute that the review had been granted on an untenable ground, but it was contended on his behalf that the order granting the review was not open to question on this ground in appeal. As regards the grounds on which an order granting an application for review could be objected to in appeal, the learned Judges noticed a difference of opinion between decisions of this Court. They referred to 6 cases where it had been definitely held that the grounds, open to an appellant, were limited to those specified in O. 47, R. 7 of the Code of 1908 or S. 629, of the previous Code, as the case might be, and 3 more, where too, the ground upon which the Court had pronounced would, on close examination, be found to be one of the grounds specified in R. 7. But there was one decision of a Division Bench in 30 C. W. N. 584 *Nritya Gopal v. Jarit Manjari Dasi* ("26) 13 A. I. R. 1926 Cal. 217 : 87 I. C. 770 : 30 C. W. N. 584 which could not be explained away and there it had been expressly held that in an appeal from a decree passed on review, the appellate Court was entitled to see if the ground on which the review had been granted was warranted by R. 147, and if it found it was not, to hold that the review had been improperly granted. In view of this decision the learned Judges thought it necessary to refer to a Full Bench the following question of law:

Whether, when an application for review is granted and an objection is taken to the order granting the review in an appeal from the final decree passed in the suit, non-existence of the grounds of review as specified in rule 1 of that Order is available as a ground of such objection.

6. Reference was also made by the learned Judges to certain decisions of other High Courts in which one or the other of the two views had been taken, but they expressed no opinion of their own. It was contended before us on behalf of the appellants that although a direct appeal from an order granting an application for review might have to be limited to the grounds specified in R. 7, O. 47, an appeal from the decree, ultimately passed, could not, in this respect, be held to be similarly limited, in view of the wide language of Ss. 96, 100 and 104 and O. 43, R. 1. It was contended further that assuming that objections available in an appeal from the final decree were also limited to the grounds specified in R. 7, those grounds themselves covered contravention of R. 1. Rule 7 (1) (b) mentioned contravention of R. 4 as one of the proper grounds of review. Rule 4 (2) authorised the Court to grant "an application for review", which meant a proper application, that is to say, an application based on one or more of the

grounds mentioned in R. 1. If the Court granted an application which was not such an application, it contravened R. 4 (2) and, therefore, in order to establish a contravention of R. 4 (2), which was within the words of R. 7, contravention of R. 1 could properly be shown. The contention of the appearing respondent was that the provisions relied on by the appellant could not be held to confer a right of appeal, unrestricted as to the grounds, unless it was also held that by them O. 47, R. 7 stood virtually repealed. It was contended further that both the language and the policy of the Code made it sufficiently clear that the Legislature did not intend that an order granting an application for review should be liable to objection on any ground other than those specified in R. 7, whether in a direct appeal from the order or in an appeal from the final decree. In addition to the cases referred to in the Order of Reference, the learned Advocate for the Appellants cited before us one other decision of this Court, 47 Cal. 369 Chiranjilal Ramlal v. Tulsiram Jankidas ("20) 7 A. I. R. 1920 Cal. 467 : 47 Cal. 568 : 56 I. C. 734, two decisions of the Patna High Court, 18 Pat. 777 Harballav Prasad Chowdhury and Others Vs. Jagballav Prasad Chowdhury and Another, and 75 I. C. 177 Garaini Kamarin v. Surj Narain Singh ("24) 11 A. I. R. 1924 Pat. 250 : 3 Pat. 134 : 75 I. C. 177 and one decision of the Privy Council, 61 I. A. 378 : 39 C. W. N. 1 Bisheswar Pratap Sahi v. Parath Nath ("34) 21 A. I. R. 1934 P. C. 213 : 59 All. 634 : 61 I. A. 378 : 151 I. C. 41 : 39 C. W. N. 1 (P. C.)

7. As pointed out in the Order of Reference, all the decisions of this Court, except one, are against the contention of the appellants. The one further decision cited by them before us is not of the slightest assistance to them, since there a review had been granted on the ground of discovery of fresh evidence and in an appeal from the order granting the review, it was set aside on the ground that there was no strict, or any proof before the trial Judge that the applicant had previously been unaware of the existence of the new evidence or could not have produced it at the original trial. The only decision of this Court in favour of the Appellants is, therefore, that in 30 C. W. N. 584 Nritya Gopal v. Jarit Manjari Dasi ("26) 13 A. I. R. 1926 Cal. 217 : 87 I. C. 770 : 30 C. W. N. 584. Whatever may be the correct answer to the question referred, it appears to as plain that the ground upon which that decision proceeds is erroneous. The learned Judge held that it is competent to an appellate Court to examine the ground upon which a review was granted and if it finds that the ground was one outside R. 1, O. 47, to declare that it should have been refused. For this proposition, reliance, is placed entirely on the decision of the Privy Council in 49 I. A. 144 : 26 C. W. N. 697 Chhaju Ram v. Neki ("22) 9 A. I. R. 1922 P. C. 112 : 3 Lah. 127 : 49 I. A. 144 : 72 I. C. 566 : 26 C. W. N. 697 (P. C.). "This", they say, "is clear from the case in 49 I.A. 144 Chhaju Ram v. Neki ("22) 9 A. I. R. 1922 P. C. 112 : 3 Lah. 127 : 49 I. A. 144 : 72 I. C. 566 : 26 C. W. N. 697 (P. C.) and this was the ground which was pointed out by their Lordships for their interference in that case". It is overlooked altogether that in 49 I. A. 144 Chhaju Ram v. Neki ("22) 9 A. I. R. 1922 P. C. 112 : 3 Lah. 127 : 49 I. A. 144 : 72 I. C. 566 : 26 C. W. N. 697 (P. C.) the Privy Council was not correcting an error committed by an Indian appellate Court in

the exercise of its appellate jurisdiction with regard to an order granting a review, made by the Subordinate Court whose decision was under appeal. What the Privy Council had before it was an order made by the Chief Court of the Punjab, granting a review of its own decision in an appeal and the decision ultimately passed by the Chief Court on review. It was with this order that the Privy Council interfered, sitting in appeal over the ultimate decision and that it could do on any ground not being bound by the Civil Procedure Code. The decision is no authority on the powers of an Indian Appellate Court under the Code itself.

8. In our opinion, the scope of objections to an order granting an application for review, cannot possibly be wider in an appeal from the final decree than in an appeal from the order itself. Were it so, the position would be that a person aggrieved by such an order might first prefer an appeal against it on one or more of the grounds specified in O. 47, R. 7 and if he failed in the appeal, a fresh decision would be given on a review of the previous judgment. But he might then return to the attack in an appeal from the final decision and urge other objections against the same order and if he succeeded this time as he conceivably might, the original judgment would be restored and all the time and money spent on all the proceedings since then, except the 2nd Appeal, would be absolutely thrown away. A procedure which may confuse the course of litigation in this manner cannot be held to be contemplated by the Code, unless the language used by the Legislature compels such construction. The language of O. 47, R. 7, however, points in an opposite direction, for, after forbidding appeals from an order rejecting an application for review, it provides for an appeal against an order granting an application on certain specified grounds and goes on to say that such grounds can be taken either in an immediate appeal from the order or in an appeal from the final decree. The implication clearly is that whether in the one appeal or the other, the grounds available to the appellant are the same and the only grounds that can be taken are those mentioned in the rule. This accords with what, in our view, was the object of the changes made in the Code of 1877. After the Full Bench decision in 20 W.R. 84 *Dhyrub Chunder Surmah Chowdhury v. Madhub Ram Surmah* ('73) 11 Beng. L. R. 428 : 20 W. R. 84 (F. B.) the Legislature thought it right to provide, on the one hand, for an immediate appeal, so that the parties might not be subjected to the hardship of first suffering an order for review and next a fresh decision and then being told in an appeal from the fresh decision that the review had been wrongly granted, and on the other hand, to limit the grounds of objection admissible against the order, whenever it might be challenged. There could be no sense in providing for different grounds of objection against the same order at different stages or for compartmental appeals, as it were, and, in our opinion, the Legislature has done no such thing. If the contention of the Appellants be correct, it must be held, which, in our view, is not possible, that the Legislature has indirectly kept alive the very mischief which it intended to prevent by providing for an immediate appeal.

9. The argument founded on the language of Ss. 96 and 104 and of O. 43, R. 1, is, in our view, misconceived. Those provisions of the Code deal with the right of appeal and not the grounds; and the absence of anything in the body of the Code, that is to say, the sections portion, in limitation of the right of appeal, cannot have the effect of enlarging the grounds, where the grounds are limited and specified. It is true that as regards Second Appeals, S. 100 mentions certain grounds in language of a very general character, but, in the first place, those grounds relate to the decision itself and not to any interlocutory orders which are dealt with in S. 105 and, in the second place, the general provision contained in S. 100 must be read as subject to the specific provision contained in O. 47, R. 7 in the sense that what is an error of law or defect of procedure in an order granting an application for review is defined there. The position is the same as in the case of S. 114 and O. 47, R. 1, for, the section gives the right of review and the rule gives the grounds. We are, therefore, not of opinion that by reason of the provisions of S. 100, an order granting an application for review, made by a first Appellate Court, can be challenged in a second appeal from the final decision on grounds other than those mentioned in O. 47 R. 7. There is one other circumstance which points to the conclusion at which we have arrived. Before the Code of 1908 was enacted, it has been held in a series of cases that even in an appeal from the final decree, the only grounds on which an order granting the review could be objected to, were those mentioned in S. 629. The case in 20 I. C. 670 *Sadaruddin v. Ekramuddin* ("13) 20 I. C. 670 (Cal.) was a case of second appeal, as is the present case. In spite of these decisions, the Legislature made no change in the Code of 1908 to indicate its intention that in the case of an appeal from the decree ultimately passed on review, grounds other than those mentioned in O. 47, R. 7 would be available. There were in the Code of 1882 provisions corresponding to the present Ss. 96 and 100 expressed in the same language. The only change made by the Code of 1908 was to include an order, granting a review, among the appealable orders enumerated in O. 43, thereby making express what had previously been implied in S. 629, but no change was made as to the grounds of appeal.

10. The second contention of the Appellants is, in our opinion, even less tenable. It was said that assuming that O. 47, R. 7 was exhaustive of the grounds that could be taken in any kind of appeal, contravention of R. 1 was included in contravention of R. 4 which was specifically mentioned in cl. 1 (b) of the rule. This result was said to follow from the occurrence of the phrase "application for review" in R. 4 (2) which contemplated an application in accordance with R. 1 and, therefore, so it was contended, contravention of R. 4 included the granting of an application based on grounds, foreign to the rule 1. The language of the opening clause of the present R. 7, like that of the opening clause of the old S. 629, is ill-chosen and it is clearly impossible to apply it intelligibly to all the 3 grounds of objection mentioned. In R. 7, the grounds are stated by reference not to the order granting the application for review, but to the application itself, while in S. 629 they were stated by reference to the "admission" of the application,

which meant the order. Neither, however, can fit in with all the three grounds of objection which are the same in the old and the new provision. Ground (a) is contravention of R. 2 which corresponds to the old S. 624 and has reference to the Judge to whom the application must be made. Ground (b) is contravention of R. 4 which corresponds to the old S. 626 and requires previous notice to the opposite party as also strict proof of an allegation of discovery of new evidence, while giving a general discretion to the Judge to grant the application if he thinks it should be granted. Ground (c) is limitation. It will thus appear that while the "application" may be affected by the bar of limitation and may also perhaps contravene R. 2, if not made to the proper Judge, it is not conceivable how it can contravene R. 4. The contention of the Appellants that an application contravenes R. 4 when it is not in accordance with R. 1 is, in our opinion, clearly untenable, for R. 4 is not addressed to the nature and contents of the application at all: the phrase "application for review" in the rule simply means an application, and any application, by which a review is prayed for. As regards the old S. 629, while the "admission" of an application might contravene S. 626 (R. 4), or perhaps even S. 624 (R. 2) when the admission was not by the proper Judge, it is quite impossible to find any relevancy of ground (c) which referred to limitation, for there was no time-limit then, as there is none now, within which the order of the Court must be made. The only reported case which notices the inappropriateness of the language of O. 47 R. 7; 31 M.L.J. 509 *Brahmayya v. Yellamma* ('17) 4 A. I. R. 1917 Mad. 965 : 36 I. C. 437 : 31 M. L. J. 509 says that the word "admission" must have been changed into "application" by mistake, but it overlooks the fact that even the word "admission" could not fit in with the third ground of objection.

11. But whether the word "application" is to be understood as meaning the order or whether the word "granted" is to be read after the last word "was" in the opening clause and whatever matters the grounds of objection may cover on either reading, they do not, in our opinion, cover absence of the grounds of review, as specified in R. 1. If the Legislature intended that contravention of R. 1 should also be one of the grounds of objection, there is no reason why it should not have included it in plain terms in the list of contraventions set forth in R. 7. The argument that it was left to be spelt out of the words "application for review" in R. 4 proceeds on a canon of interpretation which is so unnatural as to be almost fantastic. In our opinion, the Legislature, through the successive Codes, seems to have left the matter of a review of judgment more and more to the discretion of the Judge. It has enjoined that a review should be granted only in cases where one or more of the grounds specified in the Code exist, but at the same time it has provided that if the Judge himself thinks that his decision should be reconsidered, the exercise of his discretion cannot itself be made the subject of an attack on the ground of the non-existence of sufficient reasons, but it is liable to question only on the ground that some transgression of jurisdiction or gross violation of procedure happened, as when the Judge granting the application, was not the proper Judge to do so, or the application was granted,

although it was barred by limitation or without the notice to the opposite party. To quote from an old decision, "the Code does not seek to supervise with very jealous scrutiny the exercise of powers which, after all, tend to complete enquiry and consideration of the case upon the merits". (22 Cal. 984 Baroda Churn Ghose v. Gobinda Prasad Tewary ("95) 22 Cal. 984). It is noteworthy, as pointed out by the respondent, that the provision in the old Codes which required the Judge to record the reasons for his opinion with his own hand has now been deleted.

12. It can hardly be said that if such be the intention of the Legislature, it has left the parties to the arbitrary will of the Judge without any remedy. The parties are only affected by the ultimate decision and since an appeal will always lie from that decision any errors of fact or law can, in most cases, be corrected in that appeal, without going behind to see whether the review was rightly or wrongly granted. There is no impediment at all in the case of any error in a decision of a trial Court; none again, as regards errors of law committed by a Court of first appeal. They can all be corrected in the course of dealing with the final judgment in appeal. It is only when a Court of first appeal has made a new finding of fact in the judgment passed on review that a party is really prejudiced, for such a finding cannot ordinarily be challenged in 2nd appeal. But in most such cases, the new finding would be arrived at on a consideration of fresh evidence and the admission of such evidence would be a matter open to question, even in 2nd appeal, so that the only real prejudice would be the possibility of a remand, in case the objection is established. The chance of any real prejudice to the parties, if the words of the Code are read in their natural sense, is exceedingly small and can be no ground for attributing to them an extended meaning, in view of the other considerations to which we have referred. We have not thought it necessary to consider in detail the various decisions in which the one view or the other was taken. Most of them give no reasons and few of them were cited. But reference must be made to the decision of the Privy Council in 61 I.A. 378 Bisheswar Pratap Sahi v. Parath Nath ("34) 21 A. I. R. 1934 P. C. 213 : 59 All. 634 : 61 I. A. 378 : 151 I. C. 41 : 39 C. W. N. 1 (P. C.).

13. In that case nothing was decided and there was no argument before their Lordships on the question which, in 49 I.A. 144 Chhaju Ram v. Neki ("22) 9 A. I. R. 1922 P. C. 112 : 3 Lah. 127 : 49 I. A. 144 : 72 I. C. 566 : 26 C. W. N. 697 (P. C.), had been distinguished by Viscount Haldane, viz., the question, with regard to an order granting a review, of the powers of the appellate Court in an "appeal to a Court of appeal." The facts were that after the Subordinate Judge had disposed of the suit and dismissed it, an application for review was made before him by the plaintiffs on the ground that party who was a limited owner and whose life-interest the defendants had attached had died on the day the judgment had been delivered, or the day before, and the plaintiffs had thus become entitled to the property as reversioners. This application was granted and the Subordinate Judge, who had previously dismissed the suit, now decreed it, overlooking the fact that the suit was for a declaration of title, on the basis of

a deed of relinquishment which he had found to be fictitious and fraudulent. In an appeal to the High Court by one of the defendants, the ground that the Subordinate Judge had acted erroneously in reviewing his judgment was taken, but did not appear to have been urged. The appeal was dismissed on the finding that the Appellant could not execute a money decree, obtained against a limited owner, against properties which had come into the possession of the next reversioners. The Privy Council held that the review having been granted on a ground not covered by O. 47, R. 1, had been wrongly granted and in that view restored the original judgment of the Subordinate Judge but it disallowed costs to the successful appellant on the ground that the objection on which he succeeded had not been relied upon in the High Court. On this order of their Lordships, it was contended before us that the Privy Council had in effect held that in an appeal from the ultimate decision given on review, an objection to the review on the ground that it had been granted on a ground not warranted by R. 1. could be urged before, and entertained by, the appellate Court.

14. We are unable to hold that the order of the Privy Council can be relied upon for a proposition of so wide and general a character. It is perfectly true that their Lordships held that the ground, on which the Subordinate Judge had granted a review, was one outside R. 1 O. 47 and they restored the original judgment of the Judge on that ground. It is also true that they refused to award costs to the appellant in the view that the objection to the review, which succeeded before them, might and ought to have been urged before the High Court. But the last matter was not argued and seems to have been assumed. Neither the judgment, nor the report of the arguments, contains any indication that their Lordships' attention was drawn to R. 7 or that any question was raised or considered as to the scope of objections to an order granting a review which are open to an appellant under the provisions of the Code. In these circumstances, we do not find it possible to hold that their Lordships decided any question as to the scope of an appeal against an order for review under the Indian procedure or that they intended to overrule the very large body of Indian decisions to the opposite effect without giving any consideration to them. The actual order of their Lordships is explicable, as the Respondent pointed out, by the circumstances that the ground for review taken before the Subordinate Judge was really one of a discovery of a new matter and since it is quite plain that nothing was alleged or proved, as to the applicant having previously been unaware of it, the matter really came under R. 4 (2) (b) and, if so, it might and ought to have been urged in the appeal before the High Court under the express provision in R. 7 (1) (b). In any case, we are unable to read in the observations of their Lordships, which were only made in connection with the order for costs, a decision on so important a matter, to a consideration of which they were never invited. No inference, it need hardly be repeated, can be drawn from the act of the Privy Council itself in restoring the original judgment of the Subordinate Judge, in the view that none of the grounds of review, as specified in R. 1 existed, for, the Privy Council is not bound by the Civil Procedure Code. For the reasons given

above, the answer to the question referred must, in our opinion, be in the negative.

15. It remains to deal with the appeal which also has been referred to a Full Bench under the rules of the Court. We are clearly of opinion that the use which the learned Subordinate Judge made of the previous judgment, Ex. J., is as extraordinary as the ground upon which he granted a review. The judgment is not inter parties, the plaintiffs were not parties to the suit in which it was given and, although the vendors of the plaintiffs were, the suit having been brought after the sale to the plaintiffs they are not in any way bound by the judgment suffered by their vendors. In the circumstances, little more could be admissible of the judgment than its existence as a fact. The learned Judge, however, took statements and findings contained in it as facts and it is perfectly clear that he maintained the opinion upon which he had granted the review, viz., "the judgment in the rent suit ought to have been regarded as an important piece of evidence and thoroughly examined" and that the appeal should be "heard again especially with reference to that judgment." That was what he in due course did and since his decision was mainly influenced by matters contained in the previous judgment, which could not legitimately be imported, it must be set aside and the appeal re-heard. In the result, the question referred to a Full Bench is answered in the negative. The appeal is allowed. The judgment and the decree of the Court of appeal below are set aside and the appeal remanded to the lower appellate Court to be heard in accordance with law in the light of the observations contained in this judgment. The appellants will have from the appearing respondent their costs for the hearing before the Division Bench, but there will be no order for costs for the hearing before the Full Bench.

Biswas, J.

16. I agree.

Blank, J.

17. I agree.