

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Mussumat Mitna v. Syud Fuzl Rub and others, from the High Court of Judicature for the North-Western Provinces of Bengal; delivered December 10th, 1870.

Present:—

SIR JAMES W. COLVILLE.

LORD JUSTICE JAMES.

LORD JUSTICE MELLISH.

IT has candidly been admitted by the learned counsel for the Appellants that in this case they would despair of inducing their Lordships to interfere with the finding of the Courts in India upon the questions of fact, and the conclusions which they have drawn from the evidence on the Record. The question upon the Appeal, therefore, is narrowed to this, has there been in this cause such a mis-trial as renders it incumbent upon their Lordships to reverse the decisions under appeal, and to remand the case for the settlement of proper issues, and a re-trial upon those issues?

Their Lordships are desirous to say nothing which may have the effect of introducing any laxity in the Courts of India in regard to the observance of those provisions of the Code which direct the settlement of issues, provisions which their Lordships regard as most important. But they do not find in the Code anything which says positively that the omission to settle those issues is fatal to the trial. With respect to the former decisions of this Court, it is to be observed that the decisions upon the regulations which preceded the passing of this Code of Procedure were not altogether uniform. Most of them show their Lordships' desire to maintain the strictness of the obligation on the Judges of the country Courts to record the points to be tried, but there is one

which has been cited by Sir Roundell Palmer, which certainly shows that they did not in all cases consider the omission to be fatal. Those Regulations, moreover, contained words to the effect that no evidence should be given except upon points which had been recorded. The case in *11 Moore*, which is a case upon the Code of Procedure, appears to have been complex, and the explanation given for what took place in that case, certainly shows that their Lordships may have been exercising a discretion which cannot now be questioned. All these cases, however, differ from the present case in this respect. In this case the omission to raise the issues was brought before the notice of the Appellate Court; the Appellate Court expressed its regret, and their Lordships are glad to observe that it did express its regret that the Judge below had omitted to settle the issues. The Court, however, nevertheless conceived that it was not under any positive obligation to remand the case; but seeing that the parties had gone to trial knowing what the real question between them was, that the evidence had been taken, and that the conclusion had been in the opinion of the Appellate Court correctly drawn from that evidence, they thought it within their competence to affirm that decision without sending the case back for a re-trial. Their Lordships sitting here are not prepared to say that the Court had not power to do so under the 354th section of the Code. At all events it appears to their Lordships that there is nothing in the Code which made it imperative upon the Appellate Court, or now makes it imperative upon their Lordships, to yield to that objection, and therefore, fully concurring in the observations made by the Appellate Court that it was the duty of the Judge to settle the issues, and that it was much to be regretted that he omitted to settle those issues, they still think that under all the circumstances of the case, substantial justice having been done, there has not been that fatal mis-trial of the cause which vitiates all the proceedings and renders a new trial necessary.

Their Lordships, in coming to this conclusion, have had regard to the circumstance that no objection seems to have been taken in the Court below to dealing with the case without the settlement

of the issues. If the objection had been taken, their Lordships think that the Appellant would have stood on higher grounds, and it would then have been very difficult to say that a trial proceeding in the face of the objection could be held to be regular for any purpose. They do not, however, mean to affirm that mere waiver, or rather the omission to take the objection, is in all cases sufficient to purge the irregularity. They are of opinion that if it had appeared that substantial justice had not been done, the objection might well have been taken when it was taken before the Appellate Court, and when taken ought to have prevailed. But being of opinion that there has not in this case been a failure of justice in consequence of the omission to settle the issues, their Lordships are not prepared to send it back for further litigation, and they must therefore advise Her Majesty to dismiss the Appeal with costs.

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