

[APPELLATE CIVIL JURISDICTION.]

1872.
May 1.*Special Appeal No. 514 of 1869.*NĀ'NĀ'BHĀ'I VALLABHDA'S *Appellant.*NĀ'THĀ'BHĀ'I HARIBHĀ'I..... *Respondent.**Special Appeal—Discovery of new matter—Review—New matter showing want of jurisdiction—Practice—Withdrawal of Special Appeal—Review by lower Court.*

As a general rule the discovery of new evidence is not a ground for the admission of a review of a judgment passed in special appeal.

Whether this is so when such new evidence might affect the jurisdiction of the Court which tried the case—*Qare.*

When new evidence is discovered, the proper course for the appellant to adopt is to ask leave to withdraw his special appeal, and to apply to the lower Court for a review of its judgment.

ON the 18th day of April 1871, MELVILL J., (being requested to admit a review of judgment passed in the above special appeal, on the ground that new evidence had been discovered since the special appeal had been decided,) referred the question involved in the application to a Full Bench, with the following remarks :—

It has been the practice in this Court to admit reviews of judgment passed in special appeal on the ground of the discovery of new evidence. Following the practice, I have myself admitted some reviews, though not without considerable doubts. These doubts have been increased by recent decisions of the Calcutta and Madras Courts (*a*), and I, therefore, think it advisable to refer, for a decision by the Full Bench, the question whether the discovery of new matter or evidence is a ground for the admission of a review of a judgment passed in special appeal.

The reference was argued before WESTROPP, C.J., and MELVILL and KEMBALL, JJ.

Chunilal Maniklal, for the appellant.

Dhirajlal Mathuradas, for the respondent.

Cur. adv. vult.

(*a*) 4 Beng. L. Rep. A. J. 213; 5 Mad. H. C. Rep. 464.

1872. WESTROPP, C.J.:—The Court, when sitting in special appeal, has not ordinarily any power to determine questions of fact. Were the Court, on review of its decree made in special appeal, to set aside that decree on the discovery of new evidence, it could not make use of that new evidence for the purpose of altering any of the findings on questions of fact by the District Court. Nor would the discovery of new evidence subsequently to the making of the decree of the District Court be any ground of special appeal, although it might be good ground for an application to the District Court for a review of its decree, provided no special appeal shall have been admitted by the High Court.

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In the reasons assigned by the High Court of Madras, in *Jackammal v. Palneappa Chetty* (b), for its decision that there is not any power in the High Court to admit a review of judgment on the ground of the discovery of fresh evidence, we concur. Similar decisions have been made in Calcutta: *Panchanan Mookerjee v. Radha Nath Mookerjee* (c) *Bhyrob Nath Toee v. Kally Chunder Chowdhry* (d).

Where the new evidence, on which the review is sought, is evidence of facts which might affect the jurisdiction of the Court in special appeal, such a case would be peculiar, and possibly might constitute an exception to the general rule which we have now laid down. Whether the Court ought, in such a case, to review its decision made in a special appeal, is a question on which we refrain at present from expressing an opinion.

Pleaders should be careful to advise their clients not to prefer special appeals where the proper remedy is an application to the District Court for a review of judgment.

In *Pándurang Sadáshiv v. Moro Vásudev* (e) it appears to have been said that where an appellant discovers fresh evidence after a special appeal has been admitted, the proper course for him to pursue is to ask to have the special appeal dismissed and to apply to the lower Court for a

(b) 5 Mad. H. C. Rep. 464. (c) 4 Beng. L. R. 213 A. C. J.
(d) 16 Calc. W. Rep. Civ. R. 112. (e) 6 Bom. H. C. Rep. A.C.J. 68.

review. But since that case was decided, this Court has adopted, in several instances, what seems to be a better and more logical course, namely, to permit a special appellant to withdraw his special appeal, and thus to treat it as having never been admitted, in order to allow him to apply to the District Court to review its judgment, in cases where that was the only means, available for the appellant, of obtaining a revision of the District Court's findings upon the facts, and where, otherwise, injustice would be done. Lately, in the case of *Dullabh Shivlal v. Hope (f)* (Special Appeal No. 612 of 1870), decided, November, 9th 1871, where we considered the decree of the District Court to be erroneous in law, but the sum claimed in the suit being under Rs. 500, and, therefore, by Section 27 of Act XXIII. of 1861, not the proper subject of a special appeal, the plaintiff was permitted to withdraw his appeal, which then was to be regarded as having never been admitted, and he was left free to apply under Section 376 of the Civil Procedure Code to the District Judge for a review of his decree. On granting the permission to withdraw the special appeal, the Court might direct that the order, by which the special appeal had been admitted, should be cancelled.

We think that the question submitted to us, whether the High Court has power to grant a review of its decree on the ground of a discovery of fresh evidence, ought to be answered in the negative. We reserve our opinion, however, as to the existence of such a power where the new evidence might affect the jurisdiction of the Court.

(f) 8 Bom. H. C. Rep. A. C. J. 213.

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