

1872. intended to deal, not with the mere rights and allowances of the individual Dawlutrai, but with the emoluments of the hereditary Desaiship held by his family. And it is on the special ground that under the native rulers, this allowance was treated as permanently annexed to the office, and was confirmed in 1808 by the British Government as appurtenant to the office, and not upon the grounds assigned by the High Court (from some of which, as they have already intimated, they dissent), that their Lordships have come to the conclusion that they ought humbly to advise Her Majesty to affirm the decree under appeal, and to dismiss this appeal with costs.

THE GOVERN-
MENT OF
BOMBAY
v.
GOSVA'MI
SHRI GIRD-
HARLA'LJI.

[APPELLATE CIVIL JURISDICTION.]

June 14.

Civil Petition No. 10 of 1872.

NA'RA'YAN bin SIDOJI *Applicant.*

DA'VUDBHA'I valad FATEBHA'I *Opponent.*

Practice—Review of District Judge's judgment after admission of Special Appeal—Cancellation of order admitting Special Appeal—Civil Procedure Code Secs. 376, 378.

After a special appeal had been admitted, the special appellant withdrew it with permission to apply for a review of the Lower Appellate Court's judgment. The District Judge refused to grant a review on the ground that the admission of the special appeal was a bar to his doing so.

The High Court, to remove the difficulty raised by the District Judge, reviewed and cancelled its own order admitting the special appeal and directed that a review (which, it considered, the District Court had now power to grant) should be again applied for.

THIS was a petition for the exercise of the High Court's extraordinary jurisdiction in the matter of an order made by R. H. Pinhey, District Judge of Púna.

The applicant, Náráyan bin Sidoji, preferred a special appeal to the High Court against a decision of the District Court of Púna in Appeal No. 557 of 1866. The appeal was admitted and registered under No. 354 of 1868. On the 15th September 1868, Náráyan applied to, and obtained

leave from, the High Court (Tucker and Gibbs, JJ.) to withdraw the special appeal with permission to apply to the District Judge of Púna for a review of the judgment against which the special appeal had been preferred. Accordingly, an application for review was made by Náráyan, but the District Judge, on the 16th December 1871, rejected it on the grounds contained in the following extract from his judgment:—

“ Mr. Sakhárám Apáshot Gadkari, Pleader for the opposite party (Dávudbhái), urges that this application cannot be allowed, as a special appeal was admitted by the High Court in this case (Section 376 of the Code of Civil Procedure).

“ The objection appears to me fatal to the present application. A special appeal was admitted in this case. By Section 376 of the Code of Civil Procedure, a review of judgment of a District Court passed in regular appeal is admissible only if no special appeal have been admitted by the High Court. The Pleader of applicant contends that as the High Court permitted the applicant to withdraw from the special appeal, he is in the same position as regards his present application as if he had preferred no special appeal, but this is not the case. The withdrawal of suits is governed by Section 97 of the Code of Civil Procedure, but this section does not treat suits withdrawn as if they had been never instituted. It limits and prescribes the terms under which suits may be withdrawn and the consequences that are to follow withdrawal. I regret this result as far as this application is concerned ; for, it appears from the High Court's judgment that there would have been strong grounds for admitting the application, if it had been legally admissible. But I cannot, of course, transgress the law for the purpose of giving relief to an unfortunate litigant. The hardship to the applicant is, however, to be ascribed really not to any provision of law, but to the carelessness with which his interests were watched, when his case was under trial before the Court of Original Jurisdiction. In my opinion, it is the duty of a District Court to interpret the provisions of Section

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376 of the Code of Civil Procedure with strictness, for the Judges of a District Court are frequently changed, and the advent of a new Judge is liable to be made the occasion for a number of applications for the review of judgments passed by his predecessors * * * * * Considering, however, that no review is admissible under Section 376 of the Code of Civil Procedure of the decree of the District Court in this case, I reject this application."

The petition was argued before Sargent, C. J., and Melvill, J., on the 14th June 1872.

Dhirajlal Mathuradas for the applicant :—The District Judge has misconstrued Sec. 376 of the Civil Procedure Code in holding that no review of judgment passed in regular appeal is admissible after a special appeal has been admitted in the High Court, especially when the High Court itself directed that a review of the judgment should be granted in the interest of justice.

Naggindás Tulsidás, contra.

Per Curiam :—This is an application to obtain (in the exercise of our Extraordinary Jurisdiction) a review of an order passed by the District Judge of Puna on the 16th December 1871.

The applicant was appellant in Special Appeal No. 354 of 1868, and, on the 15th September 1868, was permitted by this court to withdraw his appeal, with a view to apply for a review of judgment in the appellate court. His application for a review has now been refused by the District Judge on the ground that the law does not allow a review of a judgment against which a special appeal has been admitted.

This question was incidentally considered in the recent judgment of a Full Bench of this Court in *Nánabhái Vallabhdás v. Náthabhái Haribhái*, (a) in which it was held that the discovery of fresh evidence is no ground for a review of a judgment passed in special appeal. The learned Judges pointed out that when fresh evidence is discovered during the pendency of the special appeal, the practice of

(a) Supráp. 89.

this Court has supplied a remedy by permitting the special appellant to withdraw his appeal, with a view of presenting an application for review in the Court below. And then, having regard to the difficulty which has been raised by the District Judge in the present case, viz., that a special appeal has not the less been "admitted," because it is subsequently withdrawn, the learned Judges say: "On granting the permission to withdraw the special appeal, the Court might direct that the order, by which the special appeal has been admitted, should be cancelled."

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It appears to us that the proper course is that indicated in the words above quoted. An order admitting a special appeal is open to review like any other order and may be cancelled, if such cancellation be "requisite for the ends of justice" (Section 378, Act VIII. of 1859). If the order for admission be annulled, it is as if the order had never been made.

The applicant has now applied in due form for a review of the order admitting his special appeal, and the Court has granted the review and annulled the order.

The applicant can again apply to the District Judge for a review of judgment, which will doubtless be granted, now that the difficulty raised by the District Judge in his order of the 16th December 1871 has been removed.