

[APPELLATE CIVIL JURISDICTION.]

*Special Appeal No. 325 of 1872.*1873.
July 29.SURBHA'I DAYA'LJI *Appellant.*RAGHUNA'TEJI VASANJI *et al.* *Respondents.**Code of Civil Procedure—Appeal—Limitation—Act IX. of 1871, Sec. 5—
Discretion to admit time-barred appeal—Power of High Court to interfere
with the discretion.*

The circumstance that a respondent who has taken, or intended to take, objections, under Sec. 348 of the Code of Civil Procedure, to the decree of the Court of first instance, at the hearing of an appeal already preferred by his opponent, has been prevented by the withdrawal of the appeal from having his objections heard, does not constitute a sufficient cause for admitting a cross appeal by such respondent after the prescribed period, Act IX. of 1871, Sec. 5.

The High Court may consider and determine upon the sufficiency of the reasons which a Judge has given for admitting an appeal after the lapse of the period limited for that purpose by law.

Mowree Bewa v. Seorundarnath Roy, 10 Calc. W. Rep. Civ. R. 178, followed.

THIS was a special appeal from the decision of W. H. Newnham, Acting Judge of the District of Surat, delivered on the 22nd June 1872, reversing the decree of the Extra Subordinate Judge of Surat.

The special appeal was heard by MELVILL and WEST, JJ.

Pándurang Balibhadra for the special appellant.

Dhirajlál Mathurádás, Government Pleader, for the special respondents.

The facts sufficiently appear from the following judgment:—

PER CURIAM:—In this case the District Judge admitted an appeal by the defendants more than ten months after the date of the decree of the Subordinate Judge. The reason, assigned by the District Judge for so doing, was the following:—The plaintiff had filed an appeal against a portion of

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the decree, and the defendants had intended to take objections to another portion of the decree under Sec. 348 of the Civil Procedure Code. On the day of hearing, however, the plaintiff withdrew his appeal, and the defendants were thereby deprived of the opportunity of filing their objections and obtaining a decision thereon. We cannot agree with the District Judge that this result constituted a sufficient cause for the non-presentation of an appeal within the period prescribed by law. As was observed in *Jaitu v. Bálu* (a) a respondent should file a cross appeal "if he desires to secure the right of asking for a decision on his objections irrespective of the contingency that the appeal, filed by the opposite party, may not come to a hearing." If, from a desire of obtaining justice more cheaply, or of securing a longer time for deliberation, or for any other reason, he prefers to await the hearing of an appeal, filed by his opponent, before he makes his own objection, he must run the risk of the opportunity, which he waits for, never being presented to him.

It has been contended that this Court has no power to interfere with the exercise of the discretion of the District Court, which was satisfied with the sufficiency of the reason put forward by the appellants for their delay. We are of opinion, however, that we have power to interfere when such discretion is exercised without any proper legal material to support it. In the present case, the reason, given by the District Court for the admission of the appeal, is one which, in our opinion, is not a legal or valid reason, and we must, therefore, treat the admission of the appeal as an error in law. This view is in accordance with that taken by the Calcutta High Court in *Mowree Bewa v. Soorundarnath Roy* (b).

Reversed and Decree of Subordinate Judge restored.

NOTE.—See Act VIII. of 1859, Sec. 102, which section is applicable also in appeals. See Act XXIII. of 1861, Sec. 37.—*Ed.*

(a) 3 Bom. H. C. Rep. A. C. J. 81.

(b) 10 Calc. W. Rep. Civ. R. 178.