

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Melvill.

PANDU BIN NATHAJI (ORIGINAL DEFENDANT), APPELLANT, v. DEVJI
BIN NATHAJI AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

1883
March 8.

*Practice—Withdrawal of second appeal—Discovery of new evidence—Review
by lower Court—Civil Procedure Code Act X of 1877, Sec. 623.*

Having regard to the decisions in *Nanabhai v. Nathabhai*(1) and *Narayan v. Davudbhai*(2) and the uniform practice in accordance with them which had since obtained, and the practical similarity on this point of Act X of 1877, sec. 623, and Act VIII of 1859, sec. 376 (on which the cases above mentioned were decided), the High Court allowed the appellant to withdraw his second appeal, after it had been argued though not decided, in order that he might apply to the lower Court for a review of its judgment on the ground of the discovery of new evidence. The appellant to pay the respondent's costs of appeal.

THIS was a second appeal from the decision of R. F. Mactier, Judge of the District Court of Satara, reversing the decision of Dinkar Dhonddeo, Second Class Subordinate Judge of Vita.

The second appeal in this case, which was filed by the defendant Pandu, was admitted by the High Court on the 8th September, 1881. On the 18th January, 1883, after the appeal had been argued, but before judgment, Mr. Shantaram Narayan, pleader for the appellant, moved the Court for permission to withdraw the appeal, in order that his client might apply to the District Court of Satara for a review of its judgment, on the ground that new and material evidence had been discovered. The learned pleader relied upon *Nanabhai v. Nathabhai*(1) and *Narayan v. Davudbhai*(2) in support of his application, and on the fact that the practice, since those cases were decided, had been uniformly in accordance with them.

G. R. Kirloskar, for the respondents, opposed the application, and contended that, under section 623 of the Civil Procedure Code Act X of 1877, it was too late now for the appellant to seek to apply to the District Court for a review of its judgment inasmuch as he had preferred an appeal against it in the High Court; and that the cases cited did not apply, inasmuch as they

* Second Appeal, No. 466 of 1881.

(1) 9 Bom. H. C. Rep., 89.

(2) 9 Bom. H. C. Rep., 238

1883

PANDU
v.
DEVJI.

were decided on the wording of section 376 of Act VIII of 1859, which differed from that of section 623 of Act X of 1877.

SARGENT, C. J.—The only question which we have to consider is whether we should allow the appellant to withdraw this second appeal, in order that he may apply to the lower Court for a review of judgment, on the ground of the discovery of new evidence.

We should feel more difficulty in coming to the conclusion that the Civil Procedure Code sanction this course, if it were not for the decisions of this Court in *Nanabhai v. Nathabhai*(1) and in *Narayan v. Davudbhai*(2). These decisions have been followed by a uniform practice in accordance with them, and this practice ought not, we think, to be lightly disturbed, more especially as it was established to prevent obvious hardsip and injustice. It is true that there is a slight difference in the wording of the old law as contained in section 376 of Act VIII of 1859 and in that of section 623 of Act X of 1877. The former section allowed a person to apply for a review of a decree of a District Court in appeal, from which no special appeal had been *admitted* by the Sadar Court. The later Act provides generally for the review of decrees from which no appeal has been *preferred*. But we do not see that this slight difference of language has any important bearing upon the question. If the Full Bench in *Nanabhai v. Nathabhai*(1) was justified in holding that the effect of allowing a special appellant to withdraw his second appeal was to treat it as having never been admitted, it is not going further to say that by the same process an appeal may be treated as having never been preferred. The intention of the law seems merely to be to prevent a party, against whom judgment has been passed, from availing himself of two remedies at one and the same time, and applying for a review while his appeal is pending. This is indicated by the last paragraph of section 623 of the Code, which qualifies the first portion of that section by saying that “a person who is not appealing from a decree may apply for a review of judgment notwithstanding *the pendency of an appeal* by some other party”, thus indicating that it is the pendency of the appeal, and nothing else, which stands in the way of the application for review. This is

(1) 9 Bom. H. C. Rep., 89.

(2) 9 Bom. H. C. Rep., 238.

only just and reasonable ; but it would be hardly just and reasonable to hold that a party who discovered fresh evidence, perhaps only a day after he had presented his second appeal, should not be allowed to forego his second appeal, and apply for a review to the only Court which could consider his new evidence.

We have had some doubts whether the evidence, which the appellant in this case claims to have discovered, is of sufficient weight to justify us in giving the appellant an opportunity of applying for a review. But, on the whole, we think that he is entitled to the benefit of the District Court's opinion upon this point.

We, accordingly, permit the withdrawal of this appeal. The appellant must pay the respondents' costs of appeal.

Appeal withdrawn.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Kemball.

KACHAR BAOJ VAIJA AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS,
v. BAI RATHORE, WIDOW OF KACHAR RAJA JETHA, AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1883
February 22.

*Practice—Misjoinder of causes of action—Civil Procedure Code Act X of 1877,
Sec. 45.*

The plaintiffs sued for a declaration that the several alienations made by defendant No. 1 (a Hindu widow) to the other defendants were void, and that they, the plaintiffs, were entitled to the several properties after her death ; also for an injunction, restraining her from making similar unlawful alienations in the future.

Held, that the suit as framed was not maintainable, inasmuch as it included within it several distinct causes of action which, under section 45 of Act X of 1877, could not be joined together in the same suit.

The course which should be adopted by a Court or Judge, where there has been such a misjoinder of causes of action, discussed.

THIS was an appeal from the decision of Mukundrai Manirai, First Class Subordinate Judge of Ahmedabad, in Original Suit No. 1081 of 1878.

The plaintiffs instituted this suit, alleging that Bai Rathore (defendant No. 1) was the widow of one Raja Jetha, deceased that she had alienated various portions of her husband's immo-

* First Appeal, No. 24 of 1882.