1888 JULY 25. APPELLATE CIVIL. 13 B. 330 = 13 Ind. Jur. 391.

granted this application; for, after receiving the money in deposit, he made an order staying further proceedings in execution. The Privy Council reversed the decree of the High Court in March 1887 (1). The applicant then applied to the District Judge for the refund of the money he had deposited in Court. The District Judge was of opinion that the applicant's proper remedy was by an application for review of the District Court's decision of April, 1883. The applicant accordingly presented an application for review; but the District Judge, who was not the Judge who had decided the case, rejected the application, on the ground that he had no jurisdiction to entertain it under the provisions of s. 624 of the Code of Civil Procedure. In so ruling, we think that he was wrong; for the decision of the Privy Council, reversing the decree of the High Court in the first suit and ruling that the opponents had no right to sue, having been passed subsequently to the decree in the suit which depended on the reversed decree of the High Court, was, in our opinion, "new and important matter" within the meaning of ss. 623 and 624 of the Code. It was new matter, for it was not in existence in April, 1883, and it was certainly most important matter in the litigation between the parties. It, therefore, justified the application for review made to the successor of the Judge who delivered the judgment sought to be reviewed. We are supported in this opinion by the decision of the Calcutta High Court in *Jonmenjoy Mullick* v. *Dassmoney Dassee*(2). We, therefore, reverse the order of the District Judge, and direct that he entertain the application for review made to him under s. 624 of the Code, and dispose of it according to law. Costs of this application to be costs in the cause.

Order reversed.

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13 B. 336.

[336] APPELLATE CIVIL.

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

GULAM AND OTHERS (*Original Plaintiffs*), *Appellants* v. HAJI BADRUDIN (*Original Defendant*), *Respondent.** [4th October, 1888.]

Practice—Omission to examine witnesses—Second appeal, objection on, on the ground of such omission.

A Subordinate Judge after examining some only of the plaintiffs' witnesses was of opinion that there was no necessity for further evidence, and passed a decree for the plaintiffs. Ten witnesses whom the plaintiffs had summoned, were not examined. The defendant appealed to the District Judge. At the hearing of the appeal the plaintiffs did not inform the Judge that some of their witnesses had not been examined, nor did he become otherwise aware of the fact. He reversed the lower Court's decree, being of opinion, on appeal, that the plaintiffs' evidence had not proved their case. The plaintiffs appealed to the High Court, and contended that the decree of the lower appellate Court should be set aside, in order that the excluded evidence might be taken.

Held, that there was no sufficient reason, on second appeal, to set aside the decree. The plaintiffs ought to have brought the facts to the notice of the lower appellate Court, and not having done so they could not on second appeal take the objection in order to have a chance of a second trial.

[F., 5 Bom. L.R. 264 (265); R., 13 Bom. L.R. 1021; D., 4 Ind. Cas. 599=3 S.L.R. 106 (108).]

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* Second Appeal No. 399 of 1886.

(1) 11 B. 551.

(2) 8 C. 700.

1888
OCT. 4.

APPELLATE CIVIL.

13 B. 336.

SECOND appeal from a decision of H. J. Parsons, District Judge of Thana, reversing the decree of Rav Saheb D. G. Gharpure, Subordinate Judge of Kalyan.

This suit was brought by the plaintiffs to compel the defendant to remove a certain shed alleged to have been erected by him on ground belonging to the plaintiffs.

At the hearing only some of the plaintiffs' witnesses were examined. The plaintiffs had still ten witnesses ready to give evidence, but the Subordinate Judge was of opinion that no further evidence was necessary, and gave a decree for the plaintiffs.

The defendant appealed to the District Judge. At the hearing of the appeal the plaintiffs omitted to inform the Judge that some of their witnesses had not been examined in the Court below.

The District Judge reversed the decree of the lower Court, being of opinion that the plaintiffs' evidence had not proved their case.

The plaintiffs preferred a second appeal to the High Court.

[337] *Ghanasham Nilkanth Nadkarni*, for the appellants:—The plaintiffs are not in fault. They had summoned the witnesses, and the Judge ought to have examined them: see *Bapu* v. *Sheikh Ahmad* (1). The District Judge should have noticed the omission: see *Hurish Chunder Ghose* v. *Gopal Chunder Ghose* (2). There has been a material irregularity, and the lower Court's decree should be set aside, in order that the additional evidence may be taken.

Manekshah Jehangirshah, for the respondent:—The plaintiffs ought to have brought the omission to the notice of the lower appeal Court. The District Judge was not aware of the omission, and there was nothing on the record to inform him. The plaintiffs might have applied for a review.

JUDGMENT.

SARGENT, C. J.—It appears that the Subordinate Judge having come to a clear conclusion on the evidence already before him in favour of the plaintiffs, did not think it necessary to have the remaining ten witnesses of the plaintiffs examined. On appeal this circumstance was not brought to the notice of the Court by the plaintiffs, as was the case in *Bapu* v. *Shekh Ahmad* (1); nor did the appeal Court become aware of it by the judgment of the Court below, as in *Hurish Chunder Ghose* v. *Gopal Chunder Ghose* (2).

Under these circumstances, there is not, we think, sufficient reason, on second appeal, for setting aside the decree of the appellate Court with a view to that evidence being taken. If the plaintiffs were contented, and by their conduct they must be deemed to have been so, to take their chance of having the decree of the Subordinate Judge confirmed on appeal on the evidence before the Court, they cannot be heard afterwards to complain on second appeal that there was a material irregularity in the conduct of the case, on the ground that all their evidence was not before the appeal Court. It was their business to have brought that circumstance to the notice of the appeal Court, and not having done so, they cannot now, in our opinion, take the objection in order to have the chance of a second trial.

Decree confirmed with costs.

(1) Printed Judgments for 1874, p. 92. (2) 20 W.R.C.R. 203.