APPELLATE CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Beaman.

1906. *September* 11.

RAMAPPA BIN DAREPPA AND ANOTHER, APPLICANTS, *v.* BHARMA BIN RAMA, OPPONENT.*

Civil Procedure Code (Act XIV of 1882), sections 551, 623—Decree passed by first Court allowing plaintiff's claim—Appeal by defendant—Summary dismissal of appeal—Application by defendant to the first Court for review—Jurisdiction.

Plaintiff having obtained a decree in the first Court, the defendant appealed but his appeal was summarily dismissed under section 551 of the Civil Procedure Code (Act XIV of 1882). Subsequently the defendant applied to the first Court for review of judgment under section 623 of the Code on the ground of discovery of new and important evidence.

Held, that as the defendant had preferred an appeal and it was dismissed under section 551 of the Code, his application to the first Court for review of judgment could not be entertained.

It is open to the person aggrieved, after an appeal has been preferred, to apply for a review, provided his appeal is withdrawn. As by the cancellation of the order for admission of an appeal it is to be taken that no appeal was admitted, so by withdrawal of the appeal it must be treated as though no appeal was preferred. But when an appeal is actually dismissed, it was in fact preferred and cannot be regarded as not having been preferred.

APPLICATION under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) against an order of H. V. Chinmulgund, Second Class Subordinate Judge of Chikodi in the Belgaum District, rejecting an application for review of judgment.

The plaintiff brought a suit for partition and for the recovery of his one-third share in the family property from defendants 1 and 2 who, he alleged, were his father and brother respectively.

The defendants disputed the plaintiff's legitimacy and contended that as the plaintiff was born some time after defendant 1 began to live separate from plaintiff's mother owing to her misconduct, he was not entitled to demand a share.

* Application No. 145 of 1906 under extraordinary jurisdiction.

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The first Court found in favour of the plaintiff's legitimacy under section 112 of the Indian Evidence Act (I of 1872) and allowed the claim. The defendants appealed, but their appeal was summarily dismissed under section 551 of the Civil Procedure Code (Act XIV of 1882). The defendants, thereupon, presented an application to the first Court for review of its judgment under section 623 of the Code on the ground of the discovery of new and important evidence, but that Court rejected the application for reasons stated below :—

This is an application for a review of judgment. From the copies of the judgments produced in this case it is evident there was an appeal which was dismissed under section 551, Civil Procedure Code. Mr. Karagupikar quotes 21 Bom. 548 and argues that dismissal of an appeal under section 551 leaves the decree of the original Court untouched and that a review can be granted. But that case does not apply to this. In it there was the question of bringing the decree in conformity with the judgment under section 206, Civil Procedure Code, while in this the applicant wants to get a review on the ground of discovery of new evidence and for such a matter the ruling in 21 Bom. 548 does not apply.

The wording of section 623, clause (*a*), Civil Procedure Code, is clear. No review can be sought if an appeal has been preferred. The wording does not admit of a construction on the result of the appeal. If an appeal has been preferred no review is allowed.

I therefore reject this application with costs under section 54, clause (*c*), and section 623, clause (*a*), Civil Procedure Code.

The defendants preferred an application under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) urging that the lower Court failed to exercise a jurisdiction vested in it by law by refusing to admit the review applied for, that it acted with material irregularity in rejecting the application for review under sections 54, clause (*c*) and 623 (*a*) of the Code, that it should have held that the dismissal of an appeal under section 551 of the Code was a refusal to entertain it as in the case of an appeal dismissed as time-barred and the decree of the lower Court remains as such untouched and that it ought to have held that the mere fact of an appeal having been preferred did not deprive it of the jurisdiction to review its judgment and it is only the pendency of an appeal that operates as a bar. A *rule nisi* having been issued requiring the opponent (plaintiff) to show cause why the order of the lower Court refusing to grant a review should not be set aside,

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S. S. Patkar appeared for the applicants (defendants) in support of the rule:—The question is whether in case an appeal against a decree is summarily dismissed under section 551 of the Civil Procedure Code, an application for review of judgment should be made to the appellate Court or to the Court which passed the original decree. We presented an application for review to the Court which passed the original decree, but that Court rejected our application under sections 623 (*a*) and 54 (*c*) of the Civil Procedure Code. The effect of the dismissal of an appeal under section 551 is stated in *Bapu* v. *Vajir*(1). There it is laid down that the dismissal of an appeal is the refusal to entertain it as in the case of an appeal dismissed as time-barred. This decision was arrived at on two grounds, namely, (1) that the language of section 551 was changed in 1888 to emphasize the difference between the results of a dismissal under section 551 and confirmation under section 577 and (2) that when an appeal is dismissed under section 551, it is the decree appealed against that remains to be executed. The term "preferred" in section 623 seems to militate against our contention, but this High Court allows an application for review to be filed in the lower Court even after an appeal is preferred to the High Court. The current of decisions running from *Nanabhai Vallabhdas* v. *Nathabhai Haribhai*(2) to *Pandu* v. *Devji*(3) supports our contention. The authorities show that where there is an appeal there may be review of judgment of the Court against whose decree the appeal is preferred and allowed to be withdrawn. In *Pandu* v. *Devji*(3) it was laid down that if the Full Bench in *Nanabhai Vallabhdas* was justified in holding that the result of a special (second) appeal being allowed to be withdrawn was to treat it as never being admitted, it is not going further to say that by the same process an appeal may be treated as having never been preferred. In *Pandu* v. *Devji*(3) it has been held, relying on the last paragraph of section 623 of the Code of 1877 which is the same as in the present Code, that it is the pendency of the appeal and nothing else which comes in the way of the application for review. We applied for review on the ground of discovery of new and

(1) (1896) 21 Bom. 548 at 551.

(2) (1872) 9 Bom. H. C. R. 89.

(3) (1883) 7 Bom. 287.

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important evidence. It was, therefore, proper to apply to the Court which dealt with the evidence adduced at the hearing of the suit. We did not apply for review of the order dismissing the appeal under section 551 of the Code. Besides the final decree capable of execution is the decree of the first Court and not that of the Court in appeal, therefore the first Court had jurisdiction to entertain the application for review.

S. R. Bakhle appeared for the opponent (plaintiff) to show cause:—An appeal having been preferred against the decree of the first Court, there cannot be any application for review to that Court. The power of review is given under section 623 of the Civil Procedure Code and the section is quite explicit on the point. When an appeal is dismissed under section 551 of the Code, the appellate Court has to draw up a decree and such decree can be attacked by preferring a second appeal. The applicants should, therefore, have applied for review of the appellate Court's decree: *Shivlal Kalidas* v. *Jumaklal Nathiji Desai*[1].

JENKINS, C. J.:—This is an application to the High Court under section 622 of the Code of Civil Procedure.

The petitioners' complaint is that the lower Court has wrongly rejected an application made by them for a review of judgment under section 623 of the Code of Civil Procedure.

The ground on which the lower Court rejected that application was that an appeal had been preferred.

To this it is answered that the appeal was dismissed under section 551.

It appears to us that it was none the less preferred on that account. Indeed it was only because it was preferred that it was dismissed.

Then Mr. Patkar has contended that the line of decisions commencing with *Nanabhai Vallabhdas* v. *Nathabhai Haribhai*[2] and ending with *Pandu* v. *Devji*[3] assists him.

Those cases decide that, where there has been an appeal, there still may be a review of the judgment of the Court against whose

(1) (1893) 18 Bom 542.

(2) (1872) 9 Bom. H. C. R. 89.

(3) (1883) 7 Bom. 237.

decree the appeal was preferred, provided the appeal to the higher Court is withdrawn.

Nanabhai v. *Nathabhai*(1) was a decision under Act VIII of 1859. By section 376 of that Act it was provided that any person, considering himself aggrieved by a decree of a Court of original jurisdiction, from which no appeal shall have been preferred to a superior Court, or by a decree of a District Court in appeal from which no special appeal shall have been admitted by the Sudder Court, may, under the circumstances there indicated, apply for a review of judgment by the Court which passed the decree.

A request was made to admit a review of judgment passed in special appeal on the ground that new evidence had been discovered since the special appeal had been decided.

That matter was referred to a Full Bench, and in course of his judgment Sir Michael Westropp after indicating that the proper course was to permit the appellant to withdraw his appeal, and thus to treat it as never having been admitted, says that "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."

In the same volume of the Bombay High Court Report (*i.e.*, 9 Bom. H. C. R.), at page 238, is the case of *Narayan* v. *Davudbhai*(2), before Sir Charles Sargent and Mr. Justice Melvill; after referring to the decision in *Nanabhai* v. *Nathabhai*, and in particular to the passage which we have quoted they say: "It appears to us that the proper course is that indicated in the words above quoted"; and then they go on to say, "If the order for admission be annulled, it is as if the order had never been made."

Then we come to the decision in *Pandu* v. *Devji*(3) when Act X of 1877 was the Civil Procedure Code then in force. Its language resembles that of the present Code, for, by section 623 of that Act, it is provided that "any person considering himself aggrieved by a decree or order, but from which no appeal has been preferred, may apply for a review of judgment."

It is to be noticed that the language has been altered. There are no longer the words "from which no special appeal shall

(1) (1872) 9 Bom. H. C. R. 89. (2) (1872) 9 Bom. H. C. R. 238.
(3) (1883) 7 Bom. 287.

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have been *admitted*," but there are the words "in which no appeal shall have been *preferred*." There is undoubtedly a considerable difference between the two phrases: an admission of an appeal is an act of the Court, the preferring of an appeal is the act of the party. Yet the learned Judges in *Pandu* v. *Devji*[1] held that notwithstanding this change of language it was still open to a person aggrieved, after a special appeal had been preferred to the High Court, to apply for a review provided that his appeal to the High Court was withdrawn. After referring to *Nanabhai* v. *Nathabhai*[2] the learned Judges say "it is not going further to say that by the same process an appeal may be treated as having never been preferred." It is obvious, therefore, that the learned Judges considered that it was important to establish that either in fact or in fiction no appeal had been preferred, and their reasoning is that as by the cancellation of the order for admission it was to be taken that no appeal had been admitted, so by a withdrawal of the appeal it must be treated as though no appeal had been preferred.

But if we accept, as we are bound to accept, this process of reasoning which has now become part of the established practice of the Court, can we say, when the Court has actually dismissed the appeal, that the appeal has not been preferred?

We can see no legitimate mode of reasoning by which we can come to that result.

The appeal in fact was preferred, and in our opinion nothing has happened to justify us in saying that it can now be regarded as not having been preferred.

Therefore, we are of opinion that there was no error, within the meaning of section 622, committed by the Judge of the lower Court and we must, therefore, discharge this rule with costs.

Rule discharged.

G. B. R.

(1) (1883) 7 Bom. 287.

(2) (1872) 9 Bom. H. C. R. 89.