1897.
February 22 and March 12.

WITHERS, J.

LOKU BANDA *v.* ASSEN.

C. R., Matale, 1,214.

Judgment in appeal—Review—Discovery of fresh evidence.

The Supreme Court has power to review a judgment of its own passed in appeal where it appears that fresh evidence has been discovered since such judgment was pronounced.

THE facts sufficiently appear in the judgment.

Van Langenberg, for petitioner.

Wendt, for respondent.

Cur. adv. vult.

12th March, 1897. WITHERS, J.—

On the application of the plaintiff in case No. 1,214 of the Court of Requests of Matale, entitled *Loku Banda, late Arachchi v. Ossen*, I ordered the record to be brought up in order to decide whether there should be a new trial of the case on the grounds put forward by the plaintiff in his application.

The plaintiff had sued one Ossen as the heir-at-law of the owner of a certain land, to have it declared that that land which Ossen, as such heir-at-law, possessed was liable for a mortgage debt which had been assigned to the plaintiff at a Fiscal's sale. In the opinion of the Commissioner he failed to prove the execution of the mortgage bond which created the debt, and in consequence the Commissioner dismissed his action. An appeal was taken from this judgment, and it was argued before me. I considered that the Commissioner was right in dismissing the plaintiff's case.

Owing to the loss of a record in the Commissioner's Court the plaintiff was unable to produce a piece of evidence in writing which might have estopped the defendant from denying two important facts (which he did deny in his answer), that the person who purported to grant the bond did in fact make it, and was the owner of the property which she purported to hypothecate for the debt which has been assigned to the plaintiff. This was the ground on which the plaintiff applied for a new trial. After the affirmance of the Commissioner's judgment and the return of the record to his Court this important piece of evidence was discovered in the record room of the Court below.

I am satisfied that the plaintiff used all due diligence in attempting to discover this document, and I am satisfied that it was quite out of his power to give secondary evidence of that document, and to prove the defendant's signature to it and presentment of it.

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But the chief question which was discussed at the hearing of this matter was whether under circumstances such as the present I could make any order in revision. I do not think this case has been provided for in our Jurisdiction Ordinance, No. 1 of 1889. At first I thought it came within the combined provisions of sections 21 and 39 and 40 of Ordinance No. 1 of 1889, but my better judgment is that it does not come within those provisions. Revision must not be confounded with review, and we have not taken over, as far as I am aware, the provisions of the Indian Act of Procedure which relate to the review of judgments on the ground (with others) of the discovery of fresh evidence.

Still I am not prepared to say that this Court cannot review its judgment passed in appeal on such a ground as the present one, when I bear in mind the case of *ex parte* Gordon decided by the Full Court, presided over by Phear, C.J., which will be found reported in *2 S. C. C. 108*. Indeed I might go so far as to say that I would treat this case as if my judgment had been brought up in review as distinct from revision, if I thought that the plaintiff had made out such a proper case, for the parties have been fully heard by their counsel; but on a careful consideration of the original proceedings of the Court below, I come to the conclusion that the plaintiff has not made out a proper case, for he did not exhaust all the evidence which was available to him to prove the making of the mortgage bond, or rather, perhaps, I should say that he did not satisfy the Commissioner that the attesting witnesses to the mortgage bond, who, according to the notary, professed themselves to be personally acquainted with the maker of the bond, and who, therefore, might have indentified the maker, were dead, and therefore could not be produced to testify to the identity of the person who made the bond. For these reasons I must dismiss the petitioner's application, but as I ordered the case to be brought up I think it right to make no order as to costs. Nor do I think that the plaintiff should suffer more than he has done from the unfortunate misplacement of a record in the Court below.