

Pandit *Ajudhia Nath* and Babu *Oprokash Chandar*, for the appellant.

Munshi *Hanuman Prasad* and the *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the respondents.

1878

---

JEDNI  
v.  
BHAGWAN  
SAHAL.

The judgment of the High Court, so far as it related to this contention, was as follows :

SPANKIE, J.—The first plea would fail if we hold that the suit should have been brought within one year from the date of the order passed under s. 246 of Act VIII of 1859. For it is the order then made which, if contested at all, must be contested within one year, and after that date cannot be questioned. The Full Bench decision of this Court in *Badri Prasad v. Muhammad Yusuf* (1) has conclusively settled this point. Whether the decree was settled after the order was made has no bearing on the point at issue. Having examined the record of this case and the order made under s. 246, Act of VIII of 1859, there cannot be a doubt that the plaintiff was and now is entirely bound by that order, and that she cannot now re-assert her title to the house which was not allowed as against the judgment-debtor and decree made in 1874.

---

## APPELLATE CIVIL.

*Before Mr. Justice Spankie and Mr. Justice Oldfield.*

LACHMAN SINGH AND ANOTHER (DEFENDANTS) v. SANWAL SINGH  
(PLAINTIFF).\*

---

1878  
January 2.

*Act VIII of 1859 (Civil Procedure Code) s. 7—Relinquishment or Omission to sue for any part of Claim—Fraud—Cause of Action.*

S, as one of the heirs of his brother M, sued the sons of M, the other heirs of M, for, amongst other things, a declaration of his right to share in the rights and interests of M as the mortgagee under a deed of mortgage, which he valued at the principal sum advanced under the mortgage, viz., Rs. 5,600, stating his cause of action to be the obstruction caused by the sons of M to his sharing in M's estate. He obtained a decree declaring his title to the share claimed. L, one of the sons of M, had fraudulently concealed from and kept S in ignorance of the fact that previously to the suit he had realised Rs. 8,624 under the mortgage. On this fact

---

\* Special Appeal, No. 1043 of 1877, from a decree of J. H. Prinsep, Esq., Judge of Cawnpore, dated the 11th June, 1877, affirming a decree of Ram Kali Chaudhri, Subordinate Judge of Cawnpore, dated the 22nd July, 1876,

1878

LACHMAN  
SINGH  
v.  
SARWAL  
SINGH.

coming to S's knowledge he sued the sons of M to recover his share of that sum. Held that the second suit was not barred by s. 7 of Act VIII of 1859. *Balwant Singh v. Chittan Singh* ( ) followed and observed on.

THIS was a suit for Rs. 2 540-11-0, being the plaintiff's share of the moneys recovered by Lachman Singh, a defendant in the suit, on a deed of mortgage dated the 14th February, 1871, together with interest thereon. The plaintiff in the suit was the brother of Manohar Singh, deceased, the mortgagee, and he and his brother and his brother's sons were members of a joint and undivided Hindu family. In 1874, after Manohar Singh's death, the plaintiff, as one of the heirs of Manohar Singh, sued his nephews to establish his right to a share in Manohar Singh's estate, including in that suit a claim to share in the rights and interests of Manohar Singh under the deed of mortgage, valuing such rights and interests at Rs. 5,600, the principal sum. He obtained a decree in that suit which declared, amongst other things, his right to the share claimed. After obtaining this decree it came to the plaintiff's knowledge that Lachman Singh had in 1873 realised from the mortgagor Rs. 8,624, being the original debt due under the mortgage together with interest, a fact which Lachman Singh had fraudulently concealed from and kept him in ignorance of. He therefore brought the present suit to recover from his nephews his share of that sum. Lachman Singh, on his own behalf and on behalf of his minor brother, set up as a defence to the suit, amongst other matters, that the suit was barred by the provisions of s. 7 of Act VIII of 1859. The Court of first instance, refusing to admit this defence, gave the plaintiff a decree which, on appeal by the defendants, the lower appellate Court affirmed.

The defendants then appealed to the High Court, again contending that the suit was barred by s. 7 of Act VIII of 1859.

Pandits *Bishambhar Nath* and *Nand Lal*, for the appellants.

The *Junior Government Pleader* (*Babu Dwarka Nath Banarji*), for the respondent.

The judgment of the Court was delivered by

OLDFIELD, J.—The plaint in the former suit is badly drawn up, but the claim, so far as the mortgage-debt is concerned, was clearly

for a declaration that the plaintiff was entitled to a fifth share in the sum lent under the mortgage-deed. The plaintiff stated the principal sum to be Rs. 5,600, and his own share in that sum Rs. 1,120. He did not sue to recover any portion of the debt. He claimed by right of succession, and his cause of action was the obstruction offered by the defendants to his possession of the family estate. It appears that at the time he instituted the first suit the defendant had realised the original debt with interest to the amount of Rs. 8,624. The plaintiff had no knowledge of this fact which was concealed from him; and he now sues to recover his share of that sum. We find that the defendant wrongfully appropriated the assets of the estate, and the Judge's finding is to the effect that he dishonestly concealed from the plaintiff information that he had realised the debt. We have thus the element of fraud introduced into the transaction and giving another cause of action to that on which the former suit was brought. We concur with the Judge in holding that, under the circumstances, s. 7 of Act VIII of 1859 cannot be applicable to bar this suit. We notice that a similar view was taken by this Court in *Bulwunt Singh v. Chittan Singh* (1), and without endorsing or accepting all that is in that judgment, we consider that it expresses the course that we should adopt in this case. We dismiss the appeal with costs.

*Appeal dismissed.*

## APPELLATE CIVIL.

*Before Mr. Justice Pearson and Mr. Justice Oldfield.*

DURGA PRASAD (PLAINTIFF) v. KHAIRATI AND OTHERS (DEFENDANTS).\*

*Act VIII of 1859 (Civil Procedure Code), ss. 337, 351—Act XXIII of 1861, s. 37—  
Appeal—Appellate Court, powers of.*

An appellate Court, hearing an appeal *ex parte* in the absence of the respondent, cannot, *suo motu*, raise points in favour of the respondent, but must confine its decision to the questions raised by the appellant.

\* Special Appeal, No. 995 of 1877, from a decree of W. Lane, Esq., Officiating Judge of Moradabad dated the 10th May, 1877, reversing a decree of Maulvi Wajih-ul-Jah Khan, Subordinate Judge of Moradabad, dated the 21st January, 1875.

(1) H. C. R., N.-W. P. 1871, p. 27. For a case in which the omission was due to a *bonâ fide* mistake, and it was held, following *Buzloor Ruheem v. Shamsunissa Begum*, 8 W. R. P. C. 3, that the result

was the same as if there had been an act of deliberate relinquishment, see *Ganes Chandra Chowdhry v. Ram Kumar Chowdhry*, 3. B. L. R. A. C. 265; S. C., 12 W. B. 79.

1878

LACHMAN  
SINGH  
v.  
SANWAL  
SINGH.

1878  
January 2.