

brothers, and the case being governed by the Mitakshara law, the widow of Dindayal would succeed to his estate, and not the nephews, the brother's sons of Dindayal. The defendants, therefore, having obtained mutation of their names as heirs of Dindayal, and having held possession of his estate for more than twelve years prior to the death of the widow, that act was hostile to the widow, and that possession was adverse to her. It is settled law that if a widow, without fraud or collusion, would be barred, the reversioner claiming to succeed on her death would also be barred. That the possession of the defendants was adverse, and that the proprietary right of the widow was invaded by their act is beyond doubt; but it has been stated that there is evidence of fraud and collusion on the part of the widow.

A decision passed between the brothers of the present plaintiff and the defendants has been alluded to, but this decision is no evidence in this case, as it is not between the parties to the present suit. It is true that in that decision there is an abstract of a statement made by Kanhya Lal, one of the principal defendants in this suit, but taking that abstract, as it stands, there is nothing in it which imputes fraud to the widow. In the absence, therefore, of any allegation, much less of any proof of fraud, we hold that the possession of the defendants has been adverse to the widow for more than 12 years, and that the widow would have been barred if she had sued. It follows that the reversioners, the plaintiffs, in this suit are equally barred.

We, therefore, dismiss the special appeal with costs and interests.

*Before Mr. Justice Kemp and Mr. Justice Glover*

SHIU DAS NARAYAN SING (PLAINTIFF) v. BHAGWAN DUTT  
AND OTHERS (DEFENDANTS.)\*

*Special Appeal—New Issues.*

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A party cannot be permitted to change, in special appeal, the allegations on which he went to trial in the Court below, and to raise altogether a new issue,

Baboo Krishna Sakha Mookerjee for appellant.

Baboo Debendra Narayan Bose for respondents.

The judgment of the Court was delivered by

KEMP, J.—Two points are taken in special appeal, first, that the lower Appellate Court has misconstrued a petition filed by the plaintiff, dated the 5th of September 1859; and, secondly, that under the Mitakshara law, the father being only a sharer with the sons in the ancestral properties, on the father's rights and interest being sold, the defendant cannot get the whole property, but only

\*Special Appeal, No. 1155 of 1868, from a decree of the Principal Sudder Ameen of Tirhoot, dated the 15th February 1868, affirming a decree of the Sudder Ameen of that district, dated the 25th February 1867.

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the share to which the father was entitled ; that the lower Courts was therefore wrong in dismissing the entire claim of the plaintiff.

On the first point the petition has been read, and we are of opinion that the lower Court has not misconstrued this petition. It appears that a sale in execution was imminent, and the plaintiff applied to the Court by petition, stating that his father, owing to old age and debility, had made over the whole estate to the plaintiff, the son ; that the debt under the decree was justly due ; and that the plaintiff had no present means to meet the decree, and, therefore prayed the Court, either to apply the provisions of section 243 of the Code of Procedure, or to give him one month's grace, within which to raise the money to pay off the decree ; this petition is, therefore, not, as the appellant contends, a simple prayer for the postponement of the sale, but a distinct admission of the justness of the debt and of the liability of the estate to pay the same.

The second point is a new one : it was not raised in the pleadings below : the plaintiff's case below was that his father was extravagant, and contracted the debts for purposes not sanctioned by the Hindu law, and an issue was raised on these pleadings to the effect of whether the plaintiff's father wasted the said properties, by extravagance not countenanced by the Hindu law, or incurred debts for purposes sanctioned by the Hindu law, such as the marriage of daughters and other charitable acts. The Courts below found that there was no proof of the extravagance of the father, and that the alienations were made for purposes sanctioned by the Hindu law.

We cannot permit the special appellant to entirely change in special appeal the allegations on which he went to trial.

We dismiss the special appeal with costs.

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*Before Mr. Justice Kemp and Mr. Justice Glover.*

LACHMI NARAYAN PURI (INTERVENOR) v. PUKHRAJ SING AND OTHERS  
(PLAINTIFFS.)\*

*Act X. of 1859 s. 77—Intervention*

Where an intervenor in a rent suit applies to be made a party under section 77 of Act X. of 1859, distinctly relying upon that section, it must be inferred that his case is that he has been in receipt and enjoyment of the rent before and up to the time of the commencement of the suit, and his petition should not be rejected, because it does not contain the words " that he claimed to occupy and receive the rent.

Mr. R. E. Twidale for appellant.

Baboo Khetra Mohan Mookerjee, Budhsen Sing, and Munshi Mohammed Yusaff for respondents.

\* Special Appeal, No. 1393 of 1868, from a decree of the Judge of Gya, dated the 29th February 1868 affirming, a decree of the Deputy Collector of that district, dated the 12th November 1867.