

1869  
 July 5.

*Before Mr. Justice Kemp and Mr. Justice Glover.*  
 GOPALSING (PLAINTIFF) v. KANHYA LAL SAHEBZADA  
 AND ANOTHER (DEFENDANTS.)\*

*Hindu Widow—Mitakshara Law—Adverse Possession—Reversioners.*

Where after the death of a Hindu who had been separate in estate from his brothers, and, during the life-time of his widow, his brother's sons obtained mutation of their names on the Collector's rent-roll, and held possession of the estate, in right of inheritance, for more than 12 years, held, that, under the Mitakshara law, the possession by the nephews being adverse to the widow, the claim of the reversioner, on her death was barred.

*Baboo Kalimohan Doss for appellant.*

*Babooo Ramesh Chandra Mitter and Hem Chandra Banerjee, for respondents.*

KEMP, J.—This was a suit, on the part of the plaintiff, for possession, by right of inheritance, of certain properties left by his maternal grandfather, Dindayal. There are two sets of defendants in this case, the first set claiming as the heirs of Dindayal, and the second set claiming as purchasers from these heirs. They pleaded that the suit of the plaintiff was barred, and the Judge found that as more than twelve years had elapsed from the date of the alienation, which alienation the Judge found took place in 1254, and as the plaintiff's cause of action did not arise in 1273, from the death of the life tenant, the widow of Dindayal, but from the date of the alienation, namely, in 1254, the suit of the plaintiff was barred. The Judge proceeded to add that there was a petition of the plaintiff, a copy of which had been filed by the defendant, which petition would certainly seem to show that the plaintiff had waived his right of succession to the estate of Dindayal.

We think that the Judge has come to a correct finding, and that the suit of the plaintiff is barred, though we do not think that the reasons given by the Judge are altogether correct. The Judge has evidently treated this case as if the property in dispute had been alienated by the widow, and as if all the defendants were purchasers from the widow; but such is not the case. On the contrary, the plaint itself discloses that the defendants, during the life-time of the widow, claimed as heirs of Dindayal, the husband of the widow and obtained a mutation of their names on the Collector's rent-roll, and held possession of the estate of Dindayal in right of inheritance. Now the acts of the defendants which took place more than 12 years before the death of the widow, were hostile to the widow, and the possession held by the defendants of the estate of Dindayal was adverse to the widow, inasmuch Dindayal having been found, by a decision of the Court, to have been separate in estate from his

\* Special Appeal, No. 2002 of 1868, from a decree of the Judge of Tirhoot, dated the 13th April 1868, reversing a decree of the Sudder Ameen of that district, dated the 9th September 1867.

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.*

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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SAHEBZADA.

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