

Before Mr. Justice Bayley and Mr. Justice Hobhouse.

GOBIND CHANDRA SARMA MAZOOMDAR (PLAINTIFF)  
v. ANAND MOHAN SARMA MAZQOMDAR AND OTHERS  
(DEFENDANTS.)\*

1869  
March 10.

*Adoption--Possession--Hindu Widow--Limitation.*

A Hindu died after leaving direction to his widow to adopt a son. Upon a partition of the joint property amongst his brothers and widow, a certain property was allotted to his widow as her share of the joint property. Afterwards, in 1849, his brothers dispossessed the widow. In 1851, she adopted a son who attained his majority in 1865, and in 1866 instituted the present suit for possession of the property.

*Held*, that the possession of the widow previous to the adoption, was not that of a trustee for the son to be adopted.

*Held*, that the suit was barred by lapse of time.

Baboo *Anukul Chandra Mookerjee* and *Nalit Chandra Sen* for appellants.

Baboo *Hem Chandra Banerjee* for respondents.

THE judgment of the Court was delivered by

HOBHOUSE, J.—In this case the plaintiff sued for possession of a certain property. He alleged that sometime previous to the year 1256 (1849) this property was held by one Shib Chandra Sarma and the Sarma defendants, as members of a joint family.

One Rambha, widow of Shib Chandra, succeeded to Shib Chandra's rights in the property sometime before the year 1255 (1848), and in that year, the plaintiff alleged, that by a *batwara* then made, the present property in dispute fell to his mother's share of the joint family property. He then stated that the Sarma defendants dispossessed his mother in the year 1256 (1849); that he, by permission of his father, was adopted by his

\* Special Appeal, No. 2405 of 1868, from a decree of the Officiating Judge of Zilla Mymensing, dated the 12th June 1868, affirming a decree of the Principal Sudder Ameen of that district, dated the 28th May 1868.

1869  
 GOBIND CHAN- so continued up to the year 1272 (1865); that in that year  
 DRA SARMA he came of age, and this suit was filed on the 21st Aswin 1273  
 MAZOOMDAR he came of age, and this suit was filed on the 21st Aswin 1273  
 v. (September 1866.)

ANAND MOHAN  
 SARMA  
 MAZOOMDAR..

The defendants objected that, inasmuch as the cause of action commenced to run from the year 1256 (1849), and inasmuch as the plaintiff had not sued until the year 1273 (1866), the plaintiff was out of Court by the application of the Statute of Limitation. On the other hand, the plaintiff pleaded the special protection afforded by the provisions of section 11, Act XIV. of 1859. The lower Appellate Court has held, that the suit is barred by the application of the Statute of Limitations.

In appeal the plaintiff urges, that, as he was not adopted until the year 1258 (1831), so his cause of action did not arise until that year, and that, as from that year until the year 1272 (1866) he was a minor, and as he sued within one year of his coming of age, so he was within time under the provision of section 11, Act XIV. of 1859.

The pleader, for the special appellant, puts the case in this way: He says that when Shib Chandra died, he gave his widow, Rambha, permission, that is a direction to adopt; that in furtherance of that permission or direction, the said Rambha did adopt, and that by reason of this permission, or direction, the said Rambha, between the years 1256 (1849) and 1258 (1851) must be supposed to have held the estate, not as a person fully representing it, but in trust for a son about to be adopted. We think, however, that this reasoning is not conclusive, because although there was a permission, or direction, to adopt, still it does not follow that the person to whom this permission, or direction, was given was legally bound to act upon it, or that she might not be, for many reasons, unable to carry it out. She might not, for instance, have been able to find any person fit or willing to accept the place of an adopted son, and the pleader for the special appellant admits that no one could legally compel her to adopt. We cannot, therefore, hold that, when there is a permission or direction, to adopt a son, a widow can be said to hold her husband's estate only in trust for the son to be adopted; and the

question really is as to whether Rambha, in the year 1256 (1849) did herself fully represent the estate of Shib Chandra.

We think that the case, *Gobind Coomar Chowdhry v. Huro-chunder Chowdhry* (1), is conclusive against the special appellant, on this point; and that that case so completely exhausts the subject before us, that we think we cannot do better than adopt it without any further arguments. We may add, however, that what is called the Shiva Ganga case, *Katama Natchier v. The Rajah of Shiva Gunga* (2); and another case *Nabin Chandra Chuckerbutty v. Iswar Chandra Chuckerbutty* (3), are strongly in point, as cases from which we may deduce that the ruling of the Division Bench of this Court before referred to, which we are now following, is strictly accurate and good in law.

The special appeal is dismissed with costs.

Before Mr. Justice L. S. Jackson and Mr. Justice Markby.

SYED AZURALI AND OTHERS (DEFENDANTS) *v.* KALI KUMAR CHUKERBUTTY (PLAINTIFF).\*

*Special Appeal—Secondary Evidence.*

1869

March 12.

In a suit on a bond executed under a mooktearnama, which was not produced, the Court of first instance admitted secondary evidence of it, and decreed the suit. In special appeal, the High Court was of opinion that the secondary evidence had been improperly admitted, and therefore the decree in the plaintiff's favor could not stand. Upon this it was contended that the suit should be dismissed, as the Court, hearing a case in special appeal, had no power, under such circumstances, either to remand the case or to call for additional evidence.

*Held*, that although the powers conferred by sections 351, 354 and 355 of Act VIII. of 1859 on the Court of regular appeal, are not directly given to the Court of special appeal, yet the Court, when it found the order of a lower Appellate Court was wrong, could point out the error and direct the lower Appellate Court to make such order as would rectify the error.

\*Special Appeal, No. 2981 of 1866, from a decree of the Judge of Backergunge dated 14th August 1866, affirming a decree of the Principal Sudder Ameen of that district dated the 16th March 1866.

(1) 7. W. R., 134.

(2) 9 Moore I. A., 534.

(3) Case No. 460 : of 1867, 29th April 1868.