

(1869) 01 CAL CK 0011

Calcutta High Court

Case No: Special Appeal No. 1155 of 1868

Shiu Das Narayan Sing

APPELLANT

Vs

Bhagwan Dutt and Others

RESPONDENT

Date of Decision: Jan. 5, 1869

Judgement

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 the share to which the father was entitled; that the lower Court 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.

2. 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.

3. 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.