

**(1869) 02 CAL CK 0024**

**Calcutta High Court**

**Case No:** Special Appeal No. 1936 of 1868

Nadir Hossein

APPELLANT

Vs

Ambika Charan Dutt and Others

RESPONDENT

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**Date of Decision:** Feb. 17, 1869

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### **Judgement**

L.S. Jackson, J.

The plaintiff in this case sued to recover possession of lands, which he had purchased from certain persons, who are the heirs of Yatam Ali, under a kabala, dated 28th Kartik 1273 (1866). The defendants claim to be entitled to the same lands under various kabalas of prior dates, two of which have been specifically brought to our notice, namely, one dated 17th Sraban 1269 (1862), which is from Baxu Bibi, who was the widow of Yatam Ali, and Maka Mea, her son. It relates to 32 bigas and 10 katas of land. Baxu Bibi, sets forth the land as hers by right of dower, and in virtue of that right she sells it. Maka Mea appears to have joined in the execution of the deed. The second kabala bears date the 19th Jaishtha 1268 (1861). It relates to two bigas and four katas of land, and purports to be executed by all the heirs of Yatam Ali. The defendant appears to have relied, in the case which he made, on the title, the absolute title of Baxu Bibi, under her right of Den mohur. But the lower Appellate Court reversing in this respect the decree of the Court of first instance, came to the conclusion that the land in question was part of the estate of Yatam Ali, and that Baxu Bibi was not entitled to it, as Den mohur, and declared the plaintiff to be entitled to the lands. It has been contended before us in special appeal that whatever may be the fact as to the dower-rights of Baxu Bibi, the defendants, at all events, were entitled to retain possession of the land as far as the shares of Baxu Bibi and Maka Mea were concerned, in regard to the 32 bigas, they being at all events two of the heirs; and were also entitled to the whole of the lands specified in the second kabala, which had been conveyed to them by the heirs collectively.

2. As to the first of these questions, it seems to me, that the defendant has made no such case in the Court below. He did not ask either of the Courts to determine what the rights or shares of Maka and Baxu were, and to allow him to retain possession

of the land to that extent; but he relied entirely on the Den mohur right of Baxu Bibi, and by that right, I think, he elected to stand or fall. I do not think, therefore, he is entitled now to ask us, in special appeal, to give him a decree to the extent of the rights of these two parties.

Markby, J.

I am of the same opinion. I think it is impossible for the defendants to set up, for the first time, in the argument on the special appeal, a case which involves an inquiry into facts not ascertained in the Courts below. Throughout this case, until now, they have maintained their absolute right as purchasers from an absolute owner. They now admit that their vendor was not absolute owner, and say that by inheritance she was entitled to a share. But there has until now been no enquiry asked for, as suggested, into the state of the family, so as to ascertain whether any, and if any, what share came to this lady. And in my opinion we ought not to commence that inquiry at the present stage of this suit.