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**(1869) 04 CAL CK 0034**

**Calcutta High Court**

**Case No:** Special Appeal No. 2796 of 1868

Kesabram Mahapattar

APPELLANT

Vs

Nandkishor Mahapattar

RESPONDENT

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**Date of Decision:** April 5, 1869

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### **Judgement**

L.S. Jackson, J.

The only question raised in special appeal is, whether the lower appellate Court was right in excluding the plaintiff from participation in the share of a deceased brother, on the ground that the plaintiff had been separated from that brother, while the defendant was in union with him at the time of his death. It is contended that the Hindu law gives a preference only to brothers who are reunited, and does not otherwise distinguish between the case of brothers united or separated. Upon this distinction, the 10th, 36th, 38th and 39th verses of section 5, chapter XI of the Dayabhaga, are cited. It is sufficient to say, that a case upon this very point was decided by Mr. Justice Wells, in the original side of this Court 1 Hyde, 214, which is quoted in the 2nd edition of the Vyavastha Darpana, pages 222 and 223, in which the same view was taken of the Hindu law as has been taken by the lower appellate Court. The learned Judge in that case appears to have based his decision in some degree upon the view, that the separation of one of four brothers virtually involves the separation of the whole; and that, consequently, the three brothers, who afterwards continued in union, must be looked upon as having been reunited. I do not think it necessary to consider here, whether this is the view or principle on which the united brother takes in preference to the separated, or whether he does so on a principle inherent in the theory of joint families. I am content to follow the authority of Mr. Justice Wells, and I think the special appeal must be dismissed with costs.

Markby, J.

2. I am of the same opinion. If, in order to meet the passages from the Dayabhaga, which have been quoted in support of this special appeal, it were necessary to resort to the hypothesis that the separation of one is the separation of all, there would be no difficulty in doing it in this case; but the very passages quoted appear to me to be, every one of

them, based upon this supposition, that a separated brother does not inherit.