

(1908) 07 BOM CK 0008
In the Bombay High Court
Case No : Second Appeal No. 227 of 1907

Nathu Piraji Marwadi

APPELLANT

Vs

Umedmal Gadumal

RESPONDENT

Date of Decision : 22-07-1908

Acts Referred:

Citation : (1908) 10 BOMLR 768

Hon'ble Judges : Chaubal, J;Batchelor, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Batchelor, J.—The first question raised in this appeal turns upon the manner in which the case was dealt with by the lower appellate Court, and to appreciate the point, it will be necessary to refer to the pleadings and issues.

2. The suit was one to obtain possession of certain land, and in the first paragraph of the plaint, the property is claimed by the plaintiff as being his ancestral property. Reference is then made to certain proceedings in a previous litigation before the High Court to which it was said that the defendant had been a party.

3. The defendant's written statement contains nine paragraphs which traverse various allegations made in the plaint. But upon a fair reading of this written statement, we do not find that the ownership of the plaintiff is anywhere contested. It is true that there is a reference to the High Court proceedings in the appeal of 1902, but that reference, we think, was merely to rebut an inference which the plaint had suggested that these earlier proceedings were binding upon the defendant, in the matter of the validity of the alienation. This view is supported by the fifth paragraph of the written statement in which the defendant's case is put upon adverse possession, and it is admitted that the lands in suit were formerly in the plaintiffs family.

4. Turning to the issues, we find that there is no issue which clearly raises the

question of title, and that was the opinion formed of the pleadings and issues by the learned Subordinate Judge who tried the case in the first instance. We think, therefore, that no question of title was ever raised in the first Court.

5. When the case came before the District Judge on appeal, the District Judge remanded it for decision on this issue :-Was the sale by Gangabai to Dewrao invalid as against the present plaintiff?

6. Now that was an issue raising a point which had never been raised before, and of which the plaintiff had consequently no notice. But the matter unfortunately does not rest there, for, when the Court of first instance makes its return to this order of remand, the District Judge proceeds to discuss and interpret his order in a particular manner, which, we think, must have taken the parties by surprise. It was, he says, the object of this issue to raise the questions whether the plaintiff was the adopted son of Piraji, whether the property in suit was part of Piraji's estate and whether it was part of estate dealt with by the guardianship certificate. All these are points which no doubt might have been taken in defence but which never had been taken and should therefore not have been allowed to be raised at the final stage of the appeal. We do not think that the District Judge was justified in exposing the plaintiff after he had obtained his decree to the brunt of a new attack of which he had never had notice during the hearing of the suit. A litigating party can only succeed *secundum allegata et probata*, and the Court should check the tendency of defeated litigants to evade their defeat by devising a new case which was never set up when it should have been set up.

7. It was endeavoured then to support the decree upon the point of limitation. But here we have the concurrent findings of both the Courts that the mortgagee's possession was not continuous for twelve years, but had suffered an interruption for at least two years.

8. The result, therefore, is that the decree of the District Judge must be reversed and the decree of the Subordinate Judge restored, and the plaintiff must have his costs throughout.