made by an appellate Court or by the High Court when exercising its powers of revision," the "*also*" plainly implying that it may be independently made by those Courts as well as by the original Courts specified in the first clause; and it is neither suggested nor implied that the powers of the original Court should in any way control or limit those of the appellate or revisional authority. In support of this view we may refer to the judgment reported in the case of *Dorasami Naidu* v. *Emperor*[1], which throws doubt upon the correctness of the decisions above mentioned. We may say that we entirely concur in the reasoning of the latter part of that judgment.

For these reasons we dismiss the application.

R. R.

(1) (1906) 30 Mad. 182.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Chaubal.

NATHU PIRAJI MARWADI (ORIGINAL PLAINTIFF), APPELLANT, *v.* UMEDMAL GADUMAL (ORIGINAL DEFENDANT), RESPONDENT.*

1908. *July* 22.

Practice—Allegations by parties at trial—Case determined on those allegations—Making a new case in appeal.

A litigating party can only succeed *secundum allegata et probata*, and the Courts 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.

A Court of appeal is not justified in exposing a party after he has obtained his decree to the brunt of a new attack of which he had never had notice during the hearing of the suit.

SECOND appeal from the decision of B. C. Kennedy, District Judge of Násik, reversing the decree passed by B. R. Mehendale, Joint Subordinate Judge at Násik.

Suit for declaration that defendant was not entitled to possession of land.

The land belonged originally to one Piraji Márwádi, who died leaving a widow Gangabai. In 1887 Gangabai sold the property to one Dewrao, who sold it to Balvantrao in 1893. Balvantrao in 1893 and 1895 mortgaged it to Gadumal, the defendant.

Meanwhile, Nathu Piraji was adopted by Gangabai in 1884.

* Second Appeal No. 227 of 1907.

1908.

NATHU PIRAJI v. UMEDMAL GADUMAL.

In 1897, Nathu Piraji (plaintiff) sued Balvantrao to recover possession of the property. Gadumal was not a party to that litigation. Nathu Piraji got a decree in 1903 against Balvantrao, in attempting to execute which he was obstructed by Gadumal. Nathu Piraji filed this suit to recover possession from Gadumal, alleging that the property was his ancestral property.

The defendant denied that he was bound by the former proceedings; and contended that his equitable right to retain possession had matured, and that the debt due to the defendant must be paid off before plaintiff could recover.

The Subordinate Judge held that the mortgage was proved, that the defendant was not barred by the former suit, that the claim was *not* barred, and that the plaintiff was entitled to recover possession with mesne profits for the period he had been dispossessed by defendant.

On appeal, the District Judge remanded the case to the Subordinate Judge for the determination of the following issues:—

1. "Was the sale by Gangabai to Dewrao invalid as against the present plaintiff?

2. If not, what is due on the mortgage?"

The Court on remand found the first issue in the negative and found that Rs. 7,266 were due.

These findings were certified to the District Judge who reversed the decree and dismissed the suit, on grounds which were expressed as follows:—

"From the facts of the present case and from the position of the parties it is clear that what was required was that the plaintiff should show that he was the adopted son of Piraji and that the property in suit was part of Piraji's estate and that it was part of the estate dealt with by the guardianship order of 1885. Until these facts were made out the case of the plaintiff against the present defendant was not in my opinion established. It did not occur to me that anything more than the merest formal proof of these facts would be necessary or indeed that they would be seriously contradicted and my sole reason for remanding the case was that there might be some proof of these points which the lower Court had in my opinion wrongly held to be proved by the judgments in the cases between the present plaintiff on the one hand and Dewrao and Balvantrao on the other. No such formal proof has however been adduced and accordingly it is not shown that plaintiff was the adopted son of Piraji, and that the property in suit could not be dealt with effectively by Gangabai. . .

In the absence of any evidence I must hold that plaintiff has not shown that he is entitled to recover from the present defendant. But I note that assuming the judgments referred to, to be admissible as proving the status of plaintiff, I should hold on them that Nathu was the adopted son of Piraji, that the property in suit was dealt with by the guardianship order and that Gangabai's alienation to Dewrao and consequently the subsequent transfer to the present defendant were ineffective, and that accordingly the plaintiff is entitled to recover.

Meanwhile I must reverse the order of the lower Court and dismiss the suit with costs."

The plaintiff appealed to the High Court.

Inverarity, with *R. R. Desai*, for the appellant.

Robertson, with *S. S. Patkar*, for the respondent.

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.

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.

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 plaintiff's family.

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.

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NATHU PIRAJI v. UMEDMAL GADUMAL.

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?

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.

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.

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.

Decree reversed.

R. R.