

which has been adopted by my learned colleague is correct. I therefore concur in the proposed order.

BY THE COURT.—The order of the Court is that the decree of the lower appellate Court be set aside and that a decree for possession of half of the property in dispute be passed in favour of Bahadur Ali, on the condition that he deposit in Court within two months from this date a sum of Rs. 734. We give Bahadur Ali the costs of this appeal in all Courts in the event of the payment of the said sum within the time aforesaid. In default of payment his suit will stand dismissed with costs in all Courts.

Appeal decreed.

1908

RAM LAL
v.
BAHADUR
ALI.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

JAGARDEO SINGH (PLAINTIFF) v. PHULJHARI AND ANOTHER

(DEFENDANTS).*

1908

May 14.

Act No. XV of 1877 (Indian Limitation Act), schedule II, article 91—Limitation—Suit for cancellation of a deed—Suit for a declaration that the transaction evidenced by the deed was fictitious.

A suit for a declaration that a transaction embodied in a particular deed was from its very inception a sham transaction is to be distinguished from a suit for cancellation of the deed. The former kind of suit does not fall within the purview of article 91 of the second schedule to the Indian Limitation Act. *Sham Lal Mitra v. Amarendra Nath Bose* (1) and *Petherpermal Chetty v. Muniandy Servay* (2) referred to.

THE facts of this case are as follows:—

The plaintiff came into Court alleging that he and his nephew Ramdeo had executed a sale-deed of certain zamindari property in favour of the defendant Musammat Phuljhari on the 27th of June 1899; that the sale was a fictitious transaction and was never given effect to; that it was agreed that Musammat Phuljhari should execute a deed of relinquishment; that a deed was drawn up and signed by her, but she refused to have it registered, and that an application for the registration of the deed made by the plaintiff to the District Registrar was refused. The plaintiff accordingly prayed for a decree directing the registration of the deed of relinquishment. This part of the

* Second Appeal No. 859 of 1907, from a decree of W. R. G. Moir, District Judge of Jaunpur, dated the 10th of April 1907, reversing a decree of Zain-ul-abdin, Subordinate Judge of Jaunpur, dated the 6th of September 1905.

(1) (1895) 1 L. R., 23 Calc., 460. (2) (1908) 12 C. W. N., 562.

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SINGH
PHULJHARI.

claim was subsequently withdrawn. He further prayed that it may be declared that the sale of the 27th of June 1899 was a fictitious transaction and without consideration. In the alternative he prayed that, if the sale transaction was held to be genuine, Rs. 800, the amount of consideration mentioned in the sale deed, should be awarded to him against the defendant. The Court of first instance, (Subordinate Judge of Jaunpur), held that the sale was a fictitious transaction and dismissed the claim. On appeal the District Judge came to the conclusion that the suit was time-barred, having been brought after three years from the date of its execution, and dismissed it. The plaintiff appealed to the High Court.

Munshi *Kalindi Prasad*, for the appellant.

Maulvi *Muhammad Ishaq*, for the respondents.

STANLEY, C.J., and BANERJI, J.—The Court below has dismissed the suit of the plaintiff appellant on the ground that it is barred by limitation under article 91 of the second schedule to the Limitation Act. The only question for determination in this appeal is whether that article governs the suit. The plaintiff's case was that he and his nephew Ramdeo executed a sale deed of certain zamindari property in favour of the defendant Musammat Phuljhari on the 27th of June 1899; that the sale was a fictitious transaction and was never given effect to; that it was agreed that Musammat Phuljhari should execute a deed of relinquishment; that a deed was drawn up and signed by her, but she refused to have it registered, and that an application for the registration of the deed made by the plaintiff to the District Registrar was refused. The plaintiff accordingly brought the present suit for a decree directing the registration of the deed of relinquishment. This part of the claim was subsequently withdrawn. He further prayed that it may be declared that the sale of the 27th of June 1899 is a fictitious transaction and without consideration. In the alternative he prayed that, if the sale transaction was held to be genuine, Rs. 800, the amount of consideration mentioned in the sale deed, should be awarded to him against the defendant. The Court of first instance held that the sale was a fictitious transaction and dismissed the claim. On appeal the learned Judge came to the conclusion that the

suit was time-barred, having been brought after three years from the date of its execution. This view of the learned Judge appears to us to be erroneous. The claim was not to set aside the sale deed, but for a declaration that from its very inception it was a sham transaction. If this was so, there was no necessity for the plaintiff to have the deed set aside, and therefore article 91 of the second schedule to the Limitation Act had no application. This was so held by the Calcutta High Court in *Sham Lal Mitra v. Amarendra Nath Bose* (1). We may also refer to the recent ruling of their Lordships of the Privy Council in the case of *T. P. Petherpermal Chetty v. R. Muniandy Serway* (2). If article 91 was applicable, the learned Judge should also have determined when the facts entitling the plaintiff to have the instrument cancelled or set aside became known to him. This he has not done. As the suit was dismissed on a preliminary ground, and in our opinion that ground is untenable, we allow the appeal, set aside the decree of the Court below and remand the case to that Court under section 562 of the Code of Civil Procedure with directions to re-admit it under its original number in the register and dispose of it according to law on the merits. The appellant will have his costs of this appeal. Other costs will follow the event.

Appeal decreed and Cause remanded.

APPELLATE CRIMINAL.

1908
May 15.

Before Mr. Justice Sir George Knox and Mr. Justice Aikman.

EMPEROR v. LACHMI NARAIN.*

Act No. XII of 1896 (Excise Act), sections 44 (2), 48 and 57—Definition—Excise Officer—Jurisdiction.

Held that a head constable is an Excise Officer within the meaning of section 57 of the Excise Act, 1896. *Queen-Empress v. Makunda* (3) followed.

On the 11th of September, 1907, one Lachmi Narain was arrested in the Bisraint Bazar, Muttra, by a head constable and a constable on suspicion of having illicit charas in his possession.

* Criminal Appeal No. 276 of 1908, from an order of H. W. Lyle, Sessions Judge of Agra, dated the 9th of November 1907.

(1) (1895) I. L. R., 23 Calc., 460.* (2) (1908) 12 C. W. N., 562.
(3) (1897) I. L. R., 20 All., 70.