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was denied by the defendants, the Court, following previous decisions, held that suit, in consequence of the allegation referred, to be a redemption suit. It will, however, be giving a wide, and as we think unwarranted, extension to the principle of those cases, to apply it in a case where there is not merely a denial by a defendant in the course of the trial of a mortgage alleged by the plaintiff, but where the plaintiff himself does not in his plaint even allege the existence of a mortgage.

Upon these grounds we are of opinion that clause (z) of section 3 of the Dekkhan Agriculturists' Relief Act does not apply to this case, and that the lower Appellate Court has jurisdiction to entertain the appeal which it has declined to admit. Whether the appellant can get over the difficulty of limitation or not we do not now express any opinion, as that point has not been considered by the Court below. We will at present only reverse the decree of that Court and remand the appeal to be dealt with according to law. Costs to abide the result.

Decree reversed.

APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Parsons.

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April 8.

ABDUL RAHIM (ORIGINAL PLAINTIFF), APPELLANT, v. KIRPARA'M
DA'JI (ORIGINAL DEFENDANT), RESPONDENT.*

Limitation Act (XV of 1877), schedule II, articles 91, 92, 93—Suit for partition of joint property—Suit where the cancellation of a fraudulent instrument is ancillary to the main relief.

Articles 91, 92, and 93 of schedule II of the Limitation Act (XV of 1877) apply only to suits brought expressly to cancel, set aside, or declare the forgery of, an instrument; but they do not apply to suits where substantial relief is prayed, and where the cancellation or declaration is merely ancillary and not necessary to the granting of such relief.

SECOND appeal from the decision of T. Hamilton, Acting District Judge of Surat, in Appeal No. 87 of 1887.

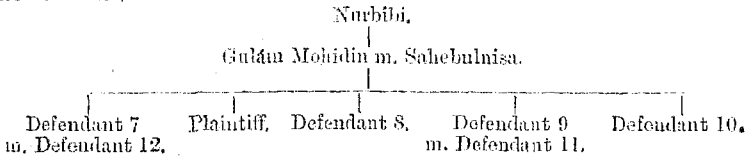
The plaintiff sued to recover his share by partition of certain property belonging to his grandmother Nurbibi:

* Second Appeal No. 820 of 1889.

The following is the pedigree of the plaintiff and of defendants 7—12 :—

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Nurbibi obtained a decree on 29th February, 1876, against her daughter-in-law Sahebulnisa and her grandchildren the plaintiff and defendants 7—9. The decree awarded her a share of 4 annas and 5½ pies in the family property. Nurbibi died in 1877 without reducing into her separate possession the whole of her share of the joint property awarded to her by the decree.

In 1886 the plaintiff filed the present suit for partition of Nurbibi's estate.

Defendants 1—6 were alienees in possession of certain portions of Nurbibi's estate, claiming the same under deeds of gift and sale executed by her in their favour.

The plaintiff alleged in his plaint that the documents on which the defendants 1—6 relied in support of their respective titles were fraudulent and colourable transactions.

The Subordinate Judge rejected the plaintiff's claim.

The District Judge confirmed the decree of the Subordinate Judge, holding that the suit was barred by limitation. His reasons appear from the following extract from his judgment :—

‘ There is in the plaint the clearest allegation that the defendants into whose hands the lands had passed had obtained them by fraud either directly or indirectly. As to the lands which defendant 1 says Nurbibi sold to him, plaintiff contends that the alleged sale-deed is either a forgery or fraudulent or invalid. In like manner he impugns the deed of gift said to have been executed by Nurbibi in favour of Mohinudin, defendant 8. I hold that under these circumstances the period of limitation is governed by article 95. The sale-deed is dated 23rd October, 1877. In appeal No. 32 of 1884 the then District Judge, Mr. E. Candy, thought that the document might have been concealed for a time. At any rate, there was no concealment in 1881. The plaintiff

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states he did not know of its existence till 1882. A mere allegation of this kind will not suffice to bring the suit within time. The present suit was laid on 8th October, 1884, or more than three years after the sale-deed was produced in Court. Consequently so far as the lands comprised in that deed are concerned, it must be held that the claim is time-barred. Similarly with regard to those lands stated in the deed of gift (of which plaintiff knew at least on 30th April, 1879,) I hold that the claim is time-barred."

Against this decision the plaintiff preferred a second appeal to the High Court.

Branson (with him *Chimanlal Harilal Setalvad*) for appellant:—Article 95 of the Limitation Act does not apply to the present case. We do not seek relief on the ground of fraud; our suit is one for partition of joint property. It is governed by article 127. We allege no doubt that the deeds under which the defendants claim are fraudulent, but we do not seek to set them aside. They are mere nullities, and therefore need not be set aside.

Gokaldas Kalandas Párek for respondents:—Plaintiff cannot succeed without setting aside the deeds on which we rely. He impeaches them as fraudulent. He therefore seeks relief on the ground of fraud. He was aware of the alleged fraud more than three years before suit. The suit is therefore barred under articles 93 and 95 of the Limitation Act. Refers to *Basdeo v. Gopil*,⁽¹⁾ *Wise v. Moulvie Abdulali*⁽²⁾ and *Rani Janki v. Raja Ajit Singh*.⁽³⁾

PARSONS, J.:—Nurbibi, the grandmother of the appellant (the present plaintiff), brought a suit in 1875 against her daughter-in-law and her grand-children (the present plaintiff and the defendants 7 to 9) for partition of their family property and was awarded therein a share of 4 annas 5½ pics. She died in 1877 before that share had fully been partitioned off and reduced into her separate possession.

The appellant has brought the present suit to recover his ¼th share in Nurbibi's estate. The suit comprises both the separated and the unseparated property of Nurbibi, and among the defend-

(1) I. L. R., 8 All., 644.

(2) 7 W. R., 136, Civ. Rat.

(3) L. R., 14 I. A., 148.

ants are persons who claim under deeds of gift and purchase from Nurbibi as well as persons who claim as co-sharers with Nurbibi and the plaintiff. The issues in the suit are, therefore, somewhat intricate. The lower appellate Court has dealt with the case on one issue only, viz, "Whether the claim is time-barred," and on its finding on that issue in the affirmative, has affirmed the decree of the Court of first instance, dismissing the suit. The Judge holds that "as there is in the plaint the clearest allegation that the defendants into whose hands the lands had passed had obtained them by fraud either directly or indirectly," the period of limitation is governed by article 95 of schedule II of Act XV of 1877. This, however, is a very summary mode of dealing with the case. In effect the Judge has dealt with the case only with reference to those defendants who claim by gift or purchase from Nurbibi, and as to those defendants we think that his decision cannot be supported. The plaintiff does not ask for any relief on the ground of fraud. Article 95 of schedule II of the Limitation Act has, therefore, no application to the case. He sues for possession by partition of the share of Nurbibi's property to which he became entitled upon her death. To his suit as against the defendants who are his co-heirs, article 127 would apply, as her property became, on her death, joint family property divisible among her heirs—*Bavasha v. Masumsha*⁽¹⁾. To his suit, as against the defendants who claim by purchase or gift from Nurbibi, article 144 would apply. No doubt, the plaintiff now impeaches the validity of the deeds under which the claims are made, and contends that they are either forgeries or fraudulent or invalid, but that does not alter the nature of the suit, as brought, or bring it under the shorter periods of limitation provided by article 91, 92 or 93 of the schedule. These articles have formed the subjects of many decisions of the Courts, but it is now, we think, fully settled that they apply only to suits brought expressly to cancel, or set aside, or declare the forgery of, some instrument, as in the case of *Rani Janki Kunwar v. Raja Ajit Singh*⁽²⁾, and that they do not apply to suits where substantial relief is prayed and where the cancellation or declaration is subservient or merely

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(1) I. L. R., 14 Bom., 70.

(2) L. R., 14 I. A., 148.

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ancillary and not necessary to the granting of such relief. See *Parám Singh v. Lálji Mal*⁽¹⁾, *Pachamuthu v. Chinnappan*⁽²⁾, *Anantan v. Sankaran*⁽³⁾, *Trilochun v. Nobokishore Guttuck*⁽⁴⁾, *Sikher Ohund v. Dulputty Singh*⁽⁵⁾, *Boo Jinatboo v. Sha Nagar Valab Kanji*,⁽⁶⁾ *Bhagwant v. Kondi*,⁽⁷⁾ and *Bellakeri Shesh-apa v. Karur Baburáv*⁽⁸⁾.

In the present case, if the deeds in question are forgeries or invalid, they will not affect the plaintiff's right to his share in the property in suit included in them; no title will have passed to the defendants from Nurbibi under them; they will be nullities in no way binding on the plaintiff; and it will not be necessary for him to have them set aside before he can obtain possession of his share. As the Judge has wrongly applied the law of limitation to the case, the appeal must go back for a fresh trial. We notice that the Judge is apparently of opinion that, because Nurbibi did not fully execute her decree, the plaintiff cannot now sue for his share in that property of which she omitted to obtain separate possession. This, we think, is an error. At Nurbibi's death there was no one to carry on her decree to full execution, and the execution proceedings came to an end; but her heirs did not, on that account, lose all title in the property which she had not reduced into possession. Her share, whether separated or not, fell back into the general family property, and those members of the family who were then entitled to share therein, of whom the plaintiff admittedly is one, are still entitled to recover their share by partition.

We, therefore, reverse the decree of the lower appellate Court and remand the appeal for a fresh hearing with reference to the foregoing remarks. Costs to abide the result.

Decree reversed and case remanded.

(1) I. L. R., 1 All., 403.

(2) I. L. R., 10 Mad., 213.

(3) I. L. R. 14 Mad., 101.

(4) 2 C. L. R., 10.

(5) I. L. R., 5 Cal., 363.

(6) I. L. R., 11 Bom., at p. 82.

(7) I. L. R., 14 Bom., p. 279.

(8) P. J. for 1891, p. 60.