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 DUTT.

observed that, even if this were a suit for specific performance of the contract, or damages for the breach of it, it would have been necessary for the plaintiff to have alleged either performance of her part of the contract, which was the payment of Rs. 3,000 to Dwarkanath Lahory, and such further sums as might have been necessary to the maintenance of the action, or at all events that she was ready and willing to perform this condition, but was prevented by the wrongful act of the defendant. There are no such allegations, and if there had been, it does not appear that they would have been sustained by evidence, for the case set up on the part of the plaintiff was not the performance of this condition, but something very different, namely, the payment to the defendant himself of this sum of money,—a statement which is disbelieved by the High Court, in which disbelief their Lordships concur.

“ On these grounds their Lordships are of opinion that the judgment of the High Court is right, and they will humbly advise Her Majesty that this appeal be dismissed with costs.

Appeal dismissed.

Agent for appellant : Mr. Mortimer.

Agent for respondents : Mr. Wilson.

APPELLATE CIVIL.

Before Mr. Justice Jackson and Mr. Justice Mitter.

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 April 24.

NOJABUT ALI CHOWDHRY (PLAINTIFF) v. SHEIKH MOHA
 BUSEEROOLAH CHOWDHRY AND OTHERS (DEFENDANTS).*

*Execution of Decree—Limitation—Sale—Separate Suit—Act XXIII
 of 1861, s. 11.*

A. sued for possession of certain lands to which he alleged he was entitled as wussee (executor) under a wusseeutnamah (will), and which B. had fraudulently, during the minority of himself and his brother, caused to be put up for sale under a

* Special Appeal, No. 755 of 1872, from a decree of the Subordinate Judge of Chittagong, dated the 7th February 1872, reversing a decree of the Munsif of that district, dated the 30th September 1871.

decree, the execution of which was barred by lapse of time. *B.* had become the purchaser at such sale. *Held* that a suit would not lie for the purpose of having it determined that the execution of *B.*'s decree was barred.

Golam Asgar v. Lakhimani Debi (1) distinguished

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THE plaintiff in this case sued to recover possession of one talook, and to have a declaration of his right to possession of certain other talooks, alleging himself to be entitled to all this property in the capacity of wussee (executor) under a wusseentnamah (will) made by one Nasrut Ali, who was the sole owner of the property in question. It appeared that the plaintiff's father, Nasrut Ali was one of two brothers, Nasrut Ali and Mozoffur Ali, and that the plaintiff himself had one brother Yar Ali, who married and lived at some distance, and was not before the Court. The plaintiff suppressed all mention of his uncle Mozoffur's interest in the property; and in order to account for his doing so, he, as representative of his father set up the wusseentnamah, excluding his own brother Yar Ali, who, as stated above, had married and settled elsewhere. It further appeared that a decree had been obtained by the defendant Busseeroolah against Nasrut and Mozoffur; Busseeroolah in execution procured a sale of the property, and himself became the purchaser thereof. The plaintiff's contention was that the execution of this decree was barred by the law of limitation, but that the decree-holder fraudulently took out execution during the minority of himself and his brother, and so caused the sale of the property. It was admitted that the money due under the decree had never been paid otherwise than by the sale of the property.

The Munsif who tried the case held that the defendant Busseeroolah had fraudulently and illegally taken out the execution of a decree barred by the law of limitation, and had thereby caused the properties to be sold, all-giving them to have been left by the father of the plaintiff during the minority of the plaintiff and his minor brother, and that therefore the sale could not be held valid; the Munsif further held that the wusseentnamah relied on by the plaintiff had been proved; he accordingly gave a decree for the plaintiff for one-half of the property, reserving his brother's share.

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On appeal the Subordinate Judge held that the wusseentnamah had not been proved, and, considering that the plaintiff's suit was based entirely on his title under the wusseentnamah, thought it unnecessary to go into the other questions raised, and dismissed the suit.

The plaintiff appealed to the High Court.

Baboo *Nullit Chunder Sen* for the appellant.—The Subordinate Judge was bound to inquire into the question of limitation ; and if it appeared that the execution of the decree under which the property was sold was barred at the time of sale, such sale would be invalid—*Golam Asgar v. Lakhimani Debi* (1). Even if the wusseentnamah was not proved, the plaintiff would be entitled to some share in this property.

Baboo *Akheel Chunder Sen* for the respondents was not called upon.

The judgment of the Court was delivered by

JACKSON, J. (who, after stating the facts as above, continued) :—The plaintiff comes up here in special appeal, and contends that, even supposing that the wusseentnamah is not made out, yet he was, as son of Nasrut, at all events entitled to some share in the property ; that the Munsif having been of opinion that the execution was barred, and the proceedings consequently fraudulent, he was entitled to the judgment of the lower Appellate Court on that point ; and unless that Court came to a contrary conclusion, he was entitled to a decree for the share coming to him. I am inclined to think that, in so far as the plaintiff sought to recover possession of the property to which he was entitled as the representative of his father, supposing that the facts otherwise entitled him to a decree, he might have recovered notwithstanding the failure of proof of the wusseentnamah, because the effect of that document would only be to entitle him to the whole of his father's share instead of one-half ; but I am also of opinion that, even making that

(1) 5 B. L. R., 68.

concession in favor of the plaintiff, he is not much advanced in the object of the suit. We are referred to a case, *Golam Asgar v. Lakhmani Debi* (1), on which it was held by a Division Bench (I myself being a member of the Court), that the circumstance of the execution of a decree under which a sale had taken place being barred by lapse of time, invalidated the sale which took place under that execution. I entirely adhere to the opinion expressed in that case, but there is this important difference between that case and the present, that in that case apparently, (and I cannot conceive how judgment could have been given in any other state of things,) the fact of the execution being barred was determined by the Court executing the decree, or the Court hearing an appeal from the order of that Court, that is to say, the question must have been raised in a Court which was competent to determine such question under s. 11, Act XXIII of 1861, viz., the Court executing the decree, and not in a separate suit: whereas in the present case the plaintiff brings the suit for the purpose of having it determined that the execution was barred, although the contrary must have been held by the Court which was executing the decree. This I think would be directly contrary to the express intention of the Legislature in s. 11. It is not necessary in this view of this case to advert to the other circumstances which render the plaintiff's claim liable to dismissal.

The charge of fraud against the decree-holder was merely that he was executing his own decree which was barred by limitation to recover his own money, and no other circumstance has been alleged or proved to support the allegation of fraud. In this view of the case the special appeal is dismissed with costs.

Appeal dismissed.

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