here in special appeal, and contends that, even supposing that the wuseeutnama is not made out, yet he was, as son of Nusrut, at all events entitled to some share in the property; that the Moonsiff 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. We are 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 wuseeutnama, 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 we are also of opinion that even making that concession in favor of the plaintiff, he is not much advanced in the object of the suit. We are referred to a case reported in 13 Weekly Reporter, page 273 (Golam Asgur *vs.* Luckhee Monee Debee and others), in 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. We 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 we 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 section 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, we think, would be directly contrary to the express intention of the Legislature in section 11. It is not necessary in this view of the 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.

The 25th April 1873.

Present:

The Hon'ble W. Markby and E. G. Birch, *Judges.*

Contract—Promissory Note—Cause of Action—Jurisdiction.

Case No. 926 of 1872.

Special Appeal from a decision passed by the Judge of Dacca, dated the 22nd March 1872, reversing a decision of the Sudder Moonsiff of that District, dated the 15th June 1871.

F. M. Proby (Plaintiff), *Appellant,*

versus

R. C. Bell, executor of the estate of A. D. Dunne (Defendant), *Respondent.*

Baboo Doorga Mohun Doss for Appellant.

Mr. Fergusson for Respondent.

Case.—Where a plaint set forth that the late D gave plaintiff a note written in Calcutta and addressed to C, asking C to pay plaintiff Rs. 650, and plaintiff sued D (resident at the time in Mymensingh) on the allegation that the money had not been paid, the Moonsiff of Dacca considering, upon the allegations made, and having regard to Act VIII. of 1859, s. 139, that the suit was brought, not upon the promissory note, but upon the original cause of action, *viz.*, a contract made in Dacca for the sale of land (in Assam), and finding that the money was due in Dacca, considered himself to have jurisdiction, and tried the suit. In appeal the Judge reversed the decision on the ground that the Moonsiff had no jurisdiction.

HELD that the Moonsiff was warranted in trying the case upon the original cause of action, and that in that view he had jurisdiction.

Markby, J.—WE think that the judgment of the Court below must be reversed. It is quite clear that the Moonsiff had jurisdiction in the view which he took to try this suit. If the suit had remained as it was originally brought, and as the Judge seems still to consider it as a suit upon the promissory note, in all probability the Moonsiff of Dacca had no jurisdiction. But the Moonsiff, I think, very distinctly says that he considers that upon the allegations and statements made by the plaintiff, having

regard to the provisions of section 139, Act VIII. of 1859, he had a right to consider this as a suit brought, not upon the promissory note, but upon the original cause of action, namely, the contract for the sale of land made in Dacca; and he finds, and it is not disputed, that that contract was made in Dacca, and he also finds upon the evidence that the money was due at Dacca. If the Moonsiff was right in so considering this suit, there is no doubt whatever that he had jurisdiction to try it. Therefore, the only question which we have to determine in this case is whether or not the Moonsiff was at liberty so to consider this suit. Now there is no doubt that, taking the plaintiff's cause of action in this way is, to some extent, a departure from his plaint, but I do not think that it is a departure wider than that allowed in the case of Joseph *vs.* Solano,* reported in the 9th Bengal Law Reports, page 441. The question is discussed by the Chief Justice in his judgment, page 453, and he points out the course taken in that case, which is very similar to the course taken by the Moonsiff in this case, and is one which is warranted by the decision of the Privy Council there referred to. It seems to me, therefore, that the Moonsiff was warranted in trying this suit upon the original cause of action, namely, the contract made in Dacca, and in that view he had jurisdiction.

The case must, therefore, be remanded to the Judge to dispose of the appeal.

Birch, J.—I concur.

The 26th April 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and Hon'ble F. A. Glover, *Judge.*

Resumption—Right of Settlement—Relation of Landlord and Tenant.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 15th January 1872, reversing a decision of the Moonsiff of that District, dated the 15th June 1871.

Mohesh Chunder Bhuttacharjee (Plaintiff), *Appellant,*

versus

Romanath Dutt and others (Defendants), *Respondents.*

* 18 W R 424

Baboos Anund Chunder Ghossal and *Taruck Nath Dutt* for Appellant.

Baboo Nil Madhub Sen for Respondents.

M and his brothers held a tenure of 10 beeghas, &c., as lakheraj. The zemindar sued for resumption of this land and obtained a decree for 3 beeghas, &c. After this M and his brothers sold the whole tenure as lakheraj to plaintiff and took a lease from him as ryots. Subsequently the zemindar took out execution of the decree he had obtained for costs and sold M and his brothers' rights and interests in the 3 beeghas, &c., in the land which had been declared mâl. These rights were bought by R and P. After this plaintiff sued M and his heirs for rents. Defendants objected that 3 beeghas, &c., had been taken out of their possession by R and P, who, on being made defendants, denied plaintiff's right to rent, which they had paid to the zemindar:

HELD that the utmost right that M and his brothers had in the resumed land was the right to settlement, which could not be transferred without the consent of the zemindar, and that as no relation of landlord and tenant existed between plaintiff and the execution-purchasers, he could not succeed in this suit, and they ought not to have been made defendants.

Glover, J.—THE facts of this case are a little complicated, and it will be as well to detail them.

Magun and his four brothers held a tenure (alleged to be lakheraj) of 10 beeghas 17 cottahs.

The zemindar brought a suit for resumption of this land as part of his mâl estate, and succeeded in getting 3 beeghas 2 cottahs declared liable to pay rent.

After this decree was obtained, Magun and his brothers sold the whole tenure of 10 beeghas 17 cottahs as lakheraj to the plaintiff (10th Assin 1273), and then took a lease of the land as ryots from the purchaser. Their kubooleut is dated Srabun 1274, for five years, at a yearly rent of Rs. 27-14-17.

Subsequently (in 1275) the zemindar took out execution of the decree he had obtained for costs in the resumption-case, and in execution attached and sold Magun and his brothers' rights and interests in the 3 beeghas 2 cottahs of land which had been declared to be mâl.

These rights were bought by Romanath and Pitambur on the 20th Kartick 1275.

After this, the plaintiff sued Magun and his heirs under the kubooleut for the rents of 1275-77. The defendants objected that part of the land, *viz.*, 3 beeghas 2 cottahs, had been taken out of their possession by Romanath and Pitambur, and they prayed the Court to make these parties defendants. This was done, as the plaintiff admitted their possession. Romanath and Pitambur denied plaintiff's right to any rent from them; there was no relation of landlord and tenant between