

to give such evidence, or that any proceedings in the execution of that decree were tendered to the Moonsiff. We cannot assume that there were such proceedings. Without them the decree ought not to have varied the decision of the case; and for that reason the rejection of it is not a ground for a special appeal. But on the other ground, the decrees of both the lower Courts must be reversed, and the suit must be remanded for re-trial. The costs will abide the result.

Glover, J.—I am of the same opinion.

The 24th April 1873.

Present :

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Special Appeal—Suit against Law-agent—Act XI. of 1865, s. 6—Act XXIII. of 1861, s. 27.

Case No. 757 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Tipperah, dated the 12th February 1872, reversing a decision of the Moonsiff of Pauchpookooreah, dated the 29th April 1871.

Joogul Kishore Roy (Plaintiff), *Appellant,*
versus

Rughoo Nath Seal (Defendant), *Respondent.*

Baboo Rash Beharee Ghose for Appellant.

Baboos Chunder Madhub Ghose and Sreenath Banerjee for Respondent.

In a suit to recover the balance, unaccounted for, of plaintiff's money in the hands of defendant who had been employed as a law-agent on a salary to conduct and look after plaintiff's law-suits, and to receive and disburse moneys connected with such law-suits, it was HELD that the case might be brought under the terms "claim for money due under a contract" (Act XI. of 1865, s. 6), and that, therefore, under Act XXIII. of 1861, s. 27, a special appeal would not lie.

Jackson, J.—THE suit out of which this special appeal arises was a suit to recover Rs. 428, being the plaintiff's money in the hands of the defendant unaccounted for. It seems to be admitted that plaintiff retained and employed the defendant as a mookhtear or law-agent, to conduct and look after his law-suits, and to receive and disburse moneys on his account connected with such law-suits, the defendant receiving a monthly salary of Rs. 2. The service extended over something less than a year and a half, *viz.*, from 15th Falgoun 1272 to 30th Srabun

1274, and the money which passed through the defendant's hands during that time from the plaintiff amounted to Rs. 2,391, out of which, according to the plaintiff's own statement, the sum of Rs. 1,927 was accounted for over and above the defendant's wages, and the suit was for the balance.

In the opinion of the Moonsiff who tried the suit, the defendant succeeded in accounting for a larger sum than was admitted by plaintiff, and the balance was, in his judgment, reduced to Rs. 310.

On appeal, the Subordinate Judge, Mr. Hutchinson, was of opinion that, according to the nikas, that is, the defendant's statement of accounts, the sum of Rs. 2,273 "was used" in various ways on behalf of the plaintiff, "and though a portion of the money, as bribes to the Court amla, was not lawfully spent, if really so spent, yet it was spent by the plaintiff, and therefore the onus lies with the plaintiff, and he must show item by item the different sums amounting to Rs. 310-10-5, which he did not authorize the defendant to spend on his account." He then goes on to add: "In a proceeding held on the 10th instant, I gave the plaintiff's vakeel an opportunity to examine the defendant's nikas, and to prove the items of unauthorized expenditure amounting to Rs. 310-10-5. The vakeel has not been able to show this," and, thereupon, he reversed the judgment of the Court below.

It seems to us not surprising that plaintiff has preferred a special appeal, but the respondent has taken a preliminary objection that under section 27, Act XXIII. of 1861, an appeal will not lie. The special appellant replies to this objection by saying that the case does not fall within the terms of section 6, Act XI. of 1865. We feel bound to say that, in our opinion, the words of that section are sufficiently wide to include, and they do include, such a suit as the present. They include "claims for money due on bond or other contract." It was admitted by the special appellant that the word "contract" is not restricted to express contracts, but refers also to implied contracts. Assuming the concessions made on both sides, it appears that the defendant was the servant of the plaintiff, and in consideration of the wages he received he was bound to attend to his master's interests, and to disburse the moneys which he received from his master according to that master's direction, that is, it seems to us to account for such moneys, and to make good any balance that might remain in his hands. It is also possible to include this

claim under the term "damage," because the plaintiff might claim the amount for which he brought this suit as damages by reason of the wrong done by the defendant in not acting fully up to his instructions. At any rate the suit might be brought under the terms "claim for money due under a contract." That being so, it seems that we have no power to entertain this appeal, and disturb the judgment of the Lower Appellate Court, however erroneous or unreasonable it might appear. But we think it right to add one word as to the reasons for which we think the plaintiff in this case is not entitled to the sympathy of the Court. The defendant was employed as his law agent. This implies the possession by defendant of certain qualifications—knowledge of law, habits of business, and trustworthiness; and it appears that, within the course of eighteen months, money belonging to the plaintiff to the amount of Rs. 2,300 passed through the hands of the defendant, and for this combined position of trust and competency, the defendant was supposed to be remunerated by the salary of Rs. 2 per mensem. If, in this state of things, the plaintiff with his eyes open voluntarily runs the risk of placing money in the hands of the defendant without taking security from him, or otherwise assuring himself of his honesty, he can hardly expect the Court to feel much for him when the defendant is found to betray his trust. As we have said, the Court has little sympathy for the plaintiff in the present case, and under the circumstances we are less unwilling to dismiss this special appeal, but without costs.

The 24th April 1873.

Present :

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Execution—Limitation—Act XXIII. of 1861,
s. 11.

Case No. 755 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Chittagong, dated the 7th February 1872, reversing a decision of the Moonsiff of Seetakoond, dated the 30th September 1871.

Najabat Ali Chowdhry (Plaintiff), *Appellant,*
versus

Busseeroollah Chowdhry and others
(Defendants), *Respondents.*

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Baboo Nullit Chunder Sen for Appellant.

Baboo Aukhil Chunder Sen for
Respondents.

In a suit for possession and declaration of title in respect of property claimed by plaintiff under a wuseeutnamah from his father, the alleged sole proprietor, which property had been sold in execution of a decree, plaintiff's ground of action was that execution had been fraudulently taken out, during his minority, of a decree barred by limitation :

HELD that the question ought to have been raised in the Court executing the decree, and not in a separate suit, the latter course being contrary to Act XXIII. of 1861, s. 11.

Jackson, J.—It seems to us that it is impossible that the plaintiff can succeed in this case. He sued to recover possession of one talook, and to have a declaration of his right to possession in certain other talooks, alleging himself to be entitled to all this property in the capacity of *wusee* under a wuseeutnama made by one Nusrut Ali, who was the sole owner of the property in question. It appears that the plaintiff's father (Nusrut) was one of two brothers, Nusrut Ali and Mozuffur Ali, and that the plaintiff himself had one brother named Yar Ali, who married and lived at some distant place, and is not before the Court. The plaintiff suppressed all mention of his uncle Mozuffur's interest in the property, and, in order to account for his doing so, he, as representative of his father, set up the wuseeutnama excluding his own brother Yar Ali, who, as stated above, had married and settled elsewhere. It appears that there had been a decree against Nusrut and Mozuffur obtained by the defendant Busseeroollah, who executed this decree, and procured the sale of the property, and himself purchased at the sale. The plaintiff's story was that the execution of this decree had been barred by 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 is admitted that the money due under the decree has never been paid otherwise than by the sale of the property.) The Moonsiff who tried the case found on the issues stated in favor of the plaintiff, and gave him a decree for one-half of the property, reserving the brother's share.

On appeal the Subordinate Judge was of opinion that the wuseeutnama was not proved, and, considering that the plaintiff's suit was based entirely on his title under the wuseeutnama, thought it unnecessary to go into the other questions raised, and dismissed the suit. The plaintiff comes up