

(1873) 04 CAL CK 0005
In the Calcutta High Court
Case No : Special Appeal No. 755 of 1872

Nojabut Ali Chowdry

APPELLANT

Vs

Sheikh Moha Busseeroolah Chowdry and Others

RESPONDENT

Date of Decision : 24-04-1873

Acts Referred:

Citation : (1873) 04 CAL CK 0005

Final Decision : Dismissed

Judgement

Jackson, J.—The plaintiff comes up here in special appeal, and contends that, even supposing that the wusseeutnamah is not made out, yet he was, as son of Nusrat, 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 wusseeutnamah, 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 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. Lakhimani Debi* 5 B.L.R., 68, 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.