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For these reasons we reverse the Subordinate Judge's decision on the preliminary point of the construction of sections 294 and 295; but before remanding the case for a fresh decision, we allow to the opponent Manjapa's pleader time to consult his client as to whether he wishes the sale set aside on the ground that he bid on the express understanding, which was justified by the order of the Subordinate Judge, dated 11th April, 1881, that he would be allowed to set off the purchase-money against his decree.

On 27th April, 1882, Mr. Ganasham, the pleader for the opponent Manjapa, informed the Court that he preferred that the sale should be set aside altogether.

It was ordered accordingly that the sale held on the 11th April, 1881, be set aside, and that the property be re-sold.

The parties to bear their own costs in this Court and the Court of the Subordinate Judge.

ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Latham.

August 18, *September* 5.

AHMEDBHOY HUBIBBHOY (PLAINTIFF) *v.* VULLEEBHOY CASSUMBHOY AND OTHERS (DEFENDANTS).*

Practice—Civil Procedure Code (Act X of 1877), Section 135—Discovery—Inspection—Trial of issue before inspection granted.

The intention of section 135 of the Civil Procedure Code (Act X of 1877) is to give the Court the power of raising and determining an issue for the exclusive purpose of deciding the right to discovery of evidence which is to be used at the trial, and, therefore, from the nature of the case before the hearing of the cause.

It should be a rule of practice that when an order is made under section 135 of the Civil Procedure Code (Act X of 1877) by the Judge in Chambers, the suit should be set down for the trial of the particular issue as well as of the cause itself when it comes to a hearing before the same Judge.

SUMMONS in Chambers adjourned into Court to be heard before two Judges.

On the 29th of June, 1882, the plaintiff took out a summons calling upon the defendants to show cause why, before the plain-

* Suit No. 486 of 1881.

tiff was ordered to make discovery or give inspection of the books, papers and documents in his possession, power or control, relating to the dealings and transactions which the plaintiff had with the administrator of the estate of Cassumbhoy Nathubhoy before the decree in Suit No. 401 of 1876 was passed, the following issue should not be first determined, namely, "whether assuming the allegations in the fourth paragraph of the written statements of the defendants Vulleebhoy Cassumbhoy and Satbai respectively contained to be true, and assuming that the decree in Suit No. 401 of 1876 was obtained by the fraud of the plaintiff and in collusion with the defendant Fazulbhoy Cassumbhoy as in the said fourth paragraph alleged, the said decree is not now a binding and valid decree against the estate of Cassumbhoy Nathubhoy and all persons interested therein", and "whether the said decree is not now binding upon the defendants and each of them, and whether the defendants or any or either of them can now in any way object to or dispute the said decree, and why this suit should not be set down for trial of the said issue."

This suit was brought by the plaintiff to establish his right to attach a certain house, No. 28, Shamji Hussaji Street, Bombay, in execution of a decree against the estate of one Cassumbhoy Nathubhoy which he had obtained in a previous suit (No. 401 of 1876) on the 29th August, 1876. The defendants to the present suit were Vulleebhoy Cassumbhoy, Satbai, and Fazulbhoy Cassumbhoy. The first and third defendants were sons and the second defendant was the widow of the said Cassumbhoy Nathubhoy, deceased.

The plaint set forth that the said Cassumbhoy Nathubhoy died in 1864, and on the 3rd August, 1871, letters of administration, with the will annexed, were granted to the third defendant Fazulbhoy Cassumbhoy; that on the 29th August, 1876, the plaintiff obtained a decree against the estate of the said Cassumbhoy Nathubhoy for the sum of Rs. 17,243-9-7; that he had not as yet realized any part of the said decree; that in August, 1880, in execution of the said decree he attached the right, title and interest of the said Fazulbhoy Cassumbhoy (the third defendant) in the house No. 28, Shamji Hussaji Street, which formed part of the estate of the said Cassumbhoy Nathubhoy; that on the 2nd

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May, 1881, the first defendant, Vulleebhoy Cassumbhoy, obtained a summons for the removal of the said attachment, and by an order of the 22nd August, 1881, made upon the hearing of the said summons, the plaintiff was referred to a suit to establish his right to attach the said house in execution. The plaintiff prayed (*inter alia*) that the said house might be declared to be liable for, and chargeable with the amount of the said decree 29th August, 1876.

The first defendant filed a written statement in which he alleged (*inter alia*) that the decree which the plaintiff had obtained in 1876 against the estate of the said Cassumbhoy Nathubhoy, and which he now sought to execute, was obtained by fraud and in collusion with the third defendant, Fazulbhoy Cassumbhoy, the administrator of the estate; that the debt, in respect of which the said decree was obtained, was really a private debt due by the said Fazulbhoy personally to the plaintiff, and was not a debt for which the estate of the deceased was liable; that Fazulbhoy and the plaintiff had fraudulently agreed that the estate should be made liable for this debt; and that the plaintiff had, consequently, brought his suit against Fazulbhoy as administrator, and that Fazulbhoy had fraudulently consented to the decree; that at the hearing of the suit, and upon the passing of the decree, the said Vulleebhoy had applied to the Judge (Pinhey, J.) to be made a party to the suit in order that he might expose the said fraud and collusion, and prevent the passing of the decree, but the said application was refused; and, as the only defendant to the suit (the said Fazulbhoy) consented, the decree was immediately passed against the estate for the amount claimed by the plaintiff.

The first defendant also pleaded that the said house formed part of the assets of the deceased which had long since been distributed by the third defendant as administrator, and that the plaintiff had been aware of such distribution and of all dealings with the estate, but had never made any claim. The first defendant further set forth at length the circumstances under which he had become absolutely entitled to the house in question, subject to the life-interest of the second defendant in one-third share thereof. He also pleaded limitation.

The second defendant also filed a written statement which was substantially the same as that of the first defendant. She set forth in detail the circumstances under which she had acquired in July, 1876, from the third defendant, as administrator, a life-interest in a one-third share of the said house, and she pleaded that at the time she became possessed of her interest in the said house and, in fact, until the attachment of the said house by the plaintiff she had no knowledge of the decree or of the debt in respect of which the same was obtained.

In order to enable them to show that the debt for which the plaintiff obtained his decree was a private debt of Fazulbhoy's and not a debt due from the estate to the plaintiff, the defendants desired to obtain discovery and inspection of the plaintiff's books and documents, and obtained a summons for the purpose. The plaintiff contended that they were not entitled to discovery; that the decree of August, 1876, was binding upon them, and that the question of fraud and collusion could not now be raised. On the 29th June, 1882, he took out the summons above set forth. On the 12th August, 1882, it was argued before Latham, J., who adjourned the matter into Court, that it might be heard before two Judges. The summons came on for hearing before Sargent, C. J., and Latham, J.

Inverarity for the first defendant showed cause against the summons.—We admit that if we are bound by the decree of August, 1876, the discovery we seek would be useless The question is, whether we can plead the fraud by which we allege that decree was obtained. This summons is really a demurrer to our defence, and the point for decision is whether the Court has power to direct the proposed issue to be set down for hearing first as the plaintiff desires. The summons raises two questions—

(1). Whether the issue is to be determined before inspection is given ?

(2). Whether the proposed issue is to be tried before the other issues in the case are tried ?

The application is made under section 135 of the Civil Procedure Code (Act X of 1877). We contend that that section gives no

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right to have one issue tried before the other issues in a case. It gives no right of demurrer. This is clear from the fact that, although the English Judicature Rules and Orders comprise a rule (Rule 19, Order XXXI) precisely similar to this section, a special rule, viz., Rule I, Order XXVIII, was thought necessary to give the right to demur. The plaintiff here alleges that part of our defence is no defence at all, and he asks the Court to decide that question before it proceeds to try the other issues in the case. Section 135 was not intended to give the Court power to do this. Section 146 is the only section of the Code which enables the Court to try any single issue apart from the others. That issue must be one of law, and it must be sufficient to decide the whole case. That does not apply here. The decision of the proposed issue would not decide this suit.

Again, section 135 gives the plaintiff here no right to make this application. He is not entitled to take the initiative by obtaining a summons. He can only raise the point in objecting to an application made by us for discovery.

The meaning of the words in section 135 "be determined first" is that the issue may be determined before discovery or inspection is granted. They do not mean that the particular issue is to be determined before the other issues. The previous part of the section deals with discovery, not with the other issue in a case. The section by these words permits the Court to order the determination of an issue before discovery is granted, but no where indicates that the word "first" means that one issue may be heard and determined before the other issues. Counsel referred to English Rules and Orders: Rule 6, Order XXXVI; *Piercy* v. *Young*. (1).

Kirkpatrick for the second defendant on the same side.

Hon. *B. Lang* (Acting Advocate General), *contra*.—The word "first" in section 135 means "in the first instance"; that is, before any other issue is tried.

Nothing can be inferred from the absence of a section in the Code corresponding to the English Rule I, Order XXVIII. That rule was made by the English Judges, and by section 652 of the

(1) 15 Ch. Div. 475.

Code the Judges here have power to make similar rules. The Legislature never intended to deal with this point. It is for this Court now to lay down the rule of practice.

SARGENT, C. J.—The question for our decision is as to the construction and practical application of section 135 of the Civil Procedure Code (Act X of 1877). This section is *verbatim* the same as Rule 19, Order XXXI, of the English Judicature Act, which, it may be presumed, was framed on the lines of the practice of the Courts of Chancery. See remarks of Jessel, M. R., in *Anderson* v. *The Bank of British Columbia*(1). According to that practice, the right to discovery was limited by the "exigencies of the question or questions about to be tried" (Wigram on Discovery, p. 25, referred to in Kerr on Discovery, p. 17); and, accordingly, whenever a defendant raised a defence to a bill either by plea or demurrer, discovery was not granted (assuming it not to be required to prove the plea) until the plea or demurrer had been argued, and that because the discovery might never be required. It appears, however, that if the defence was by answer, as all the questions in the cause came to trial simultaneously, the right of the plaintiff to discovery was not excluded as to any point in the cause: Kerr on Discovery, p. 18, referred to Wigram on Discovery, p. 30. The practice, therefore, depended on the form of the pleadings.

The practice, however, under consideration as laid down in the Judicature Act and section 135 of the Civil Procedure Code for the application of the general principle that discovery should not be granted beyond the exigency of the question in issue, is quite independent of the form of the pleadings, which indeed in the Courts of this country is uniform in all cases, viz., by plaint and written statement and such other statements as may be made by the parties when the issues are framed and its object is clearly expressed to be that the Court should have the power to adjourn the question as to discovery until the issue or question between the parties upon which the right depends, has been determined. So far there is no difficulty in construing the section. The doubt arises upon the procedure to be adopted when the adjournment of the question of discovery is thought to

(1) 2 Ch. D. v. 654.

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be desirable by the Court as contemplated by the section. The section says: "The Court may order that the issue or question be determined first, and reserve the question as to the discovery or inspection." It was argued that by "first" was not meant "before the other issues are determined", but only "before the question as to discovery is decided"; in other words, that all that is meant is that the Court may order the question as to discovery to stand adjourned until the particular issue or question is determined. In support of this construction it was pointed out that the Code does not provide (as the Judicature Act does) for an issue or question being determined before the hearing of the cause. This construction, however, would not, in our opinion, give due effect to the clear language of the section, viz., "that the Court may order the issue or question to be tried first." If the issue is to be determined before the question as to discovery is decided, then it must necessarily be also determined before the issues are tried for which the discovery is required by the party asking for it. In other words, the intention seems to be, to give the Court the power of raising and determining an issue for the exclusive purpose of deciding the right to discovery of evidence which is to be used at the trial, and, therefore, (from the very nature of the case) before the hearing of the cause, if the application for discovery be made, as it generally is, before the trial or if made at the hearing (the possibility of which is contemplated by sections 129, 130, 131), then before the issues are tried for which it is required. The practical working of the section will doubtless be to give the Judge, before whom the application is made for discovery, the power to a certain extent of directing how the case shall be tried. In the Mofussil, where the same Judge deals with the case from the admission of the plaint up to judgment, no difficulty can arise. In this Court we think any possible inconvenience will be avoided by its being made a rule of practice that when an order is made, under section 135, by the Judge in Chambers, the suit shall be set down for the trial of the particular issue as well as of the cause itself when it comes to hearing before the same Judge.

LATHAM, J.—Nothing remains for me to add to the judgment just delivered with reference to the construction of section 135.

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That matter being now decided, I have only to say, with regard to the summons which has been argued before me, that it appears to me that the present case is eminently one in which the power conferred by section 135 should be exercised, and that it is desirable that the proposed issue, which I have in some respects amended, should be tried before the other issues in the case. It is desirable that the question raised by that issue should be at once determined, inasmuch as, if it be decided in the affirmative, it will obviate the necessity of a troublesome inspection and discovery which would very much increase the costs of the suit. The result, therefore, is that the summons is made absolute; and I order that this suit be set down for hearing for the determination of the following issue, namely, "whether assuming the allegations in the fourth paragraph of the written statement of the defendant Vulleebhoy Cassumbhoy and the defendant Satbai respectively contained to be true, and assuming that the decree in Suit No. 401 of 1876 was obtained by fraud of the plaintiff and in collusion with the defendant Fazulbhoy Cassumbhoy as in the said fourth paragraph alleged, the said decree is not, for the purposes of this suit, a binding and valid decree against the estate of Cassumbhoy Nathubhoy and all persons interested therein, and whether the said decree is not in this suit binding upon the defendants and each of them, and whether the defendants or any or either of them can in this suit in any way object to or dispute the said decree."

Summons made absolute.

Attorneys for the plaintiff.—Messrs. *Jefferson, Bhaishankar and Dinsha.*

Attorneys for the first defendant.—Messrs. *Payne and Gilbert.*

Attorneys for the second defendant.—Messrs. *Ardesir and Hormasji.*