

APPELLATE CIVIL.

Before Mr. Justice Pigot and Mr. Justice O'Keefe.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ONE OF THE
DEFENDANTS) *v.* MARJUM HOSEIN KHAN, A MINOR, THROUGH
HIS MOTHER AND GUARDIAN BEMBEHARUNNISSA
KHATOON (PLAINTIFF).*

1885
March 6.

*Appeal—Costs—Execution of decrees—Purchaser in execution of decree—
Revenue sale—Deposit—Recorded proprietors—Assignee—
Act XI of 1859, s. 31.*

An appeal will lie on a question of costs where a matter of principle is involved.

Section 31, of Act XI of 1859, must be read strictly. An assignee of the recorded proprietors is not their representative within the meaning of that section, and the Collector is justified in refusing to pay to such assignee claiming on his own behalf, money held in deposit on account of the recorded proprietors.

IN this case the facts were as follows: A certain revenue-paying estate, namely, No. 1790 on the register of the Collector of Furreedpore, was held in the following proportions: Certain persons named Roy owned an 8-anna share, and certain other persons, hereinafter called the Mahomedan sharers, owned the other 8-anna share in various proportions, one of them named Ijjatunnissa Khatoon being the proprietor of a one-and-a-half anna share. A separate account had been opened in the Collectorate in respect of the latter 8-anna share.

On the 17th of June 1865, the Mahomedan sharers mortgaged their 8-anna share to the plaintiff to secure the repayment of a sum of Rs. 3,000, with interest at one per cent. per month. On the 29th of November 1877, the plaintiff obtained a mortgage decree on his mortgage for the sum of Rs. 4,308-3-8, including interest and costs. On the 25th of April 1878, in execution of that decree, the plaintiff purchased the shares of all the Mahomedân sharers in the mehal, with the exception of

* Appeal from Original Decree No. 178 of 1883, against the decree of Baboo Jagatdurlubh Muzoomdar, Rai Bahadur, Subordinate Judge of Furreedpore, dated the 22nd June 1883.

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the share of Ijjatunnissa Khatoon, (that is to say, the plaintiff purchased six-and-a-half annas of the entire mehal) for about Rs. 800. A petition to set aside the sale was presented by the Mahomedan sharers, but that petition was finally dismissed on the 25th of March 1880. In the meantime, and on the 5th of January 1880, the 8-anna share of the mehal belonging to the Mahomedan sharers was sold by the Collector of Furreedpore for arrears of revenue under the provisions of Act XI of 1859, and purchased by one Mohesh Chunder Sircar for Rs. 5,700. After payment of the arrears of Government revenue out of this sum, the balance, namely, Rs. 5,654-11-8½, remained in the Collectorate to the credit of the recorded proprietors of the 8-anna share of the Mahomedan sharers.

The plaintiff's decree not having been satisfied by the purchase of the 6½-annas share abovementioned, he, on the 14th of March 1880, attached the said sum of Rs. 5,654-11-8½ in execution of his decree. In June 1880, he applied for and obtained from the Civil Court an order, which was despatched to the Collector for his information, and which ran as follows: "That the Collector be pleased to pay to the decree-holder, through his pleader, the sum of Rs. 1,060-3-8½ on account of the share (1½-anna share) of the judgment-debtor Ijjatunnissa Khatoon out of the aforesaid sum under attachment, and to order the balance to be released from attachment." In August 1880, the Collector complied with this order, and paid to the plaintiff the sum of Rs. 1,060-3-1½, being the portion to which Ijjatunnissa Khatoon was entitled in respect of her 1½-anna share of the total sum attached. It did not appear from the record whether or not these proceedings were *ex-parte* without notice to the opposite side.

On the 18th of May 1881 the plaintiff applied to the Collector of Furreedpore, for payment out to him of the sum still remaining in the Collectorate to the credit of the recorded proprietors, namely, of the sum of Rs. 4,594-7-11½, as purchaser under the sale of the 25th of April 1878. This application was supported by a petition signed by all the Mahomedan sharers, with the exception of Ijjatunnissa Khatoon. On the 18th of July 1881, a second application for payment was made, and supported by a similar petition. The Collector refused to pay the money to

any but the recorded proprietors, and his decision was upheld by the Commissioner on appeal, therefore the plaintiff instituted the present suit against the Secretary of State for India in Council, and the Mahomedan sharers, praying for a declaration of his right to the sum deposited in the Collectorate, for an order that the same should be paid over to him, and for an order that the Secretary of State for India in Council should pay to the plaintiff his costs of suit. The Secretary of State for India in Council, in his written statement, upheld the action of the Collector, but stated that he was willing to hand over the deposit to the plaintiff, should the Court declare that the plaintiff was rightfully entitled thereto. The Subordinate Judge decreed the plaintiff's claim, and ordered the Secretary of State for India in Council to pay the costs of the suit, on the ground that the plaintiff, by his purchase, had become the representative of the recorded proprietors within the meaning of s. 31 of Act XI of 1859, and therefore the refusal by the Collector to pay the money was not justifiable and that by such refusal he had unauthorizedly withheld the money from the plaintiff.

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The Secretary of State appealed to the High Court, on the ground that the plaintiff was not the representative of the recorded proprietors; and on the question of costs.

Baboo *Unnoda Pershad Banerjee* for the appellant.

Baboo *Baikant Nath Das* for the respondent.

The judgment of the Court was delivered by

FIGOR, J. — We think the appeal as to costs must succeed. We think the matter is clearly one in which it is competent to have an appeal, even although it is on a matter of costs, it being one affecting principle.

We think that the ground, put forward in the judgment of the Subordinate Judge, for the order as to costs is one in respect of which the lower Court is mistaken. It appears to us that the Collector did not unauthorizedly withhold the money from the plaintiff. The plaintiff claimed an independent right to demand the money from the Collector in virtue of the petition of the holders of the estate. Under s. 31 of

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Act XI of 1859 he had not the right in that capacity to claim the money: it was payable only to the recorded proprietor or his representative; or, supposing the proportionate shares to have been ascertained, to the persons recorded as entitled to the ascertained shares, or their representatives. Here, there was no receipt tendered by or on behalf of the recorded proprietors; nor did plaintiff apply for the money on their behalf, but on his own. The petition, even had it been signed by all the recorded proprietors (which it was not), did not clothe the plaintiff with such an authority to receive the money as entitled him to demand it from the Collector. Plaintiff did not demand the money on behalf of the recorded proprietors, with a receipt from them, as required by the section. He demanded it as their assignee. The section does not contemplate such a case; it does not cast on the Collector the duty of giving effect to, and as a preliminary of verifying of, such assignments. It must be read strictly. On these grounds, the order as to costs cannot be justified. The appeal must succeed, the order as to costs must be set aside, and the respondent must pay the costs of the appeal.

Appeal allowed.

APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Trevelyan.

1885.
 February 17.

MURARI SINGH (PLAINTIFF) v. PRYAG SINGH AND OTHERS
 (DEFENDANTS).^a

Execution—Sale in execution of decree—Suit for possession against auction-purchaser by setting aside sale—Civil Procedure Code (Act X of 1877) s. 244.

In execution of a decree certain property was sold in pursuance of an order under s. 244 of the Civil Procedure Code, and purchased by a person not a party to the suit, who subsequently obtained possession of the property. That order was subsequently set aside. In a suit by the judgment-debtor to recover possession of the property from the auction-purchaser by setting

^a Appeal from Appellate Decree No. 2067 of 1883, against the decree of J. F. Stevens, Esq., Officiating judge of Sarun, dated the 15th of May 1883, affirming the decree of Babu Kali Prosono Mukerji, First Subordinate Judge of that district, dated the 22nd of April 1882.