

Under the above order the case was taken up in revision on the 27th of February 1899,* when the following order was passed :—

KNOX, BANERJI and BURKITT, J.J.—We have in previous proceedings commented upon the extraordinary nature of the order passed by the learned Subordinate Judge. There is no question whatever that in passing the order he did on the 4th of January 1896, he acted with material irregularity. We accordingly set aside that order, whatever it may be, for its terms are so ambiguous and contradictory that it is impossible to interpret it, and in lieu of it we pass this order. We direct that the application of Musammât Jillo for permission to sue *in formâ pauperis* be dismissed with costs, which will be paid by Musammât Jillo. The Secretary of State will get his costs both in the lower Court and in these proceedings.

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THE
SECRETARY
OF STATE
FOR INDIA
IN COUNCIL
G.
JILLO.

APPELLATE CIVIL.

1898
November 25.

Before Mr. Justice Burkitt and Mr. Justice Dillon.

KUNJ BEHARI LAL AND ANOTHER (PLAINTIFFS) v. PARSOTAM NARAIN
(DEFENDANT).†

*Act No. XIX of 1873 (N.-W. P Land Revenue Act), sections 185 and 186—
Sale for arrears of revenue—Disposal of surplus proceeds—Distribu-
tion amongst creditors of defaulter—Suit by one of such creditors
against another—Cause of action.*

An estate which had been mortgaged separately to two different mortgagees was sold for default in payment of Government revenue. By the sale a much larger sum than was sufficient to satisfy the arrears of revenue was realized. The Collector, instead of paying the surplus to the defaulter, mortgagor, paid there-with one of the mortgagees in full and the other in part. The mortgagee who had been paid in part only sued the other mortgagee for the balance due on his (the plaintiff's) mortgage, alleging that it was prior to that of the defendant and ought to have been paid off in full. *Held*, that the suit would not lie. The

* Civil Revision, No. 49 of 1898.

† Second Appeal No. 688 of 1896, from a decree of Maulvi Muhammad Mazhar Husain, Subordinate Judge of Mainpuri, dated the 11th June 1896, reversing a decree of Babu Ishri Prasad, Munsif of Mainpuri, dated the 24th September 1894.

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action of the Collector in contravention of the express provisions of section 185 of Act No. XIX of 1873 gave the plaintiffs no cause of action against the other mortgagee.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Jogindro Nath Chaudhri* and *Munshi Ratan Chand* for the appellants.

Pandit Sundar Lal and *Munshi Gobind Prasad* for the respondents.

BURKITT and DILLON, JJ.—We are unable to agree with any of the reasons given by either of the two lower Courts for their decisions in this case. Put very briefly, the facts are as follows:—

A certain estate, which had been mortgaged separately to the plaintiffs and to the defendant, was sold to pay arrears of Government revenue. The effect of that sale was to wipe off all incumbrances theretofore existing on the estate, though of course leaving untouched the mortgagee's personal remedies, if any, against the mortgagor. The estate, when sold, produced a much larger sum than was necessary to discharge the arrears of revenue. When such an event occurs the duty of the Collector is distinctly laid down by section 185 of the Land Revenue Act of the North-Western Provinces (Act No. XIX of 1873). That section directs the Collector to pay the surplus to the person whose land has been sold, and section 186 further directs that the surplus shall not be paid to any creditor of the person whose land is sold except under the order of a Civil Court; and further that, except under such order, the money shall not be retained in the Government treasury. It is admitted here that no order of any Civil Court was passed in the matter or served on the Collector. The Collector's duty therefore, as laid down by the sections referred to above, was to have paid the money forthwith to the person whose land had been sold. That person, it seems, did apply to the Collector for the money, and the two mortgagees, the plaintiffs and defendant in this case, also applied. The Collector, disregarding the provisions of sections 185 and 186 of the Revenue Act, refused to

pay the money to the person whose land had been sold, and, disregarding the claim of the latter, he handed the money over to creditors, thereby paying off the whole of the amount alleged to be due to one creditor and part of the money alleged to be due to the other creditors. The latter thereupon, alleging that their mortgage had priority over the former creditor's mortgage, have instituted this suit against the creditor whose debt the Collector had paid in full, and claim from the latter a sum of money sufficient to pay off the balance of their own debt.

The two lower Courts, for reasons into which it is unnecessary to enter, as they are absolutely wrong from beginning to end and have failed to touch the real point in the case, have decided, one in favour of the plaintiffs and the other in favour of the defendant.

In our opinion, the plaintiffs have failed to show any cause of action in this case. According to their plaint they seem to be of opinion that they and the other creditors had a right by law to call on the Collector to discharge their debts in order of priority. That is an entirely erroneous and unfounded position. The Collector not only was not bound to discharge their debts, but he was forbidden by law to adopt such a course. In the absence of any order from a Civil Court, the Collector's duty was to have forthwith paid the surplus proceeds of the sale to the person whose land had been sold, and to no one else. He has chosen to disregard the provisions of the Act by discharging the debts of the creditors according to his own notions of equity. Such an unauthorized, and, we may call it, voluntary payment by him in violation of his duty did not, in our opinion, create any cause of action in the plaintiffs as against the defendant. In illustration of our meaning we would take the case, say, of a wealthy and philanthropic individual who, hearing of these debts, was good enough to pay off one in full and the other in part. Can it be said that such payment of one debt in full created a cause of action in the other creditor to have the balance of his debt made good, because of its priority, by the other creditor? We think not, and we

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regard the payment of this sum to this creditor by the Collector as nothing more than a voluntary act of the Collector, who, disregarding the law he was bound to administer, thought fit to divide the money in his hands, which was payable to the defaulter only, between the two creditors of the latter.

In our opinion this suit fails, there being no cause of action. For that reason, and not for the reasons given by the lower appellate Courts, which, in our opinion, are completely erroneous, we dismiss this appeal with costs.

Appeal dismissed.

1898
December 7.

REVISIONAL CIVIL.

Before Mr. Justice Knox, Acting Chief Justice, and Mr. Justice Dillon.
HARBANS LAL (DECREE-HOLDER) v. KUNDAN LAL AND OTHERS (OPPOSITE PARTIES).*

Civil Procedure Code, sections 311, 312—Execution of decree—Sale in execution—Application to set aside sale—Court limited to grounds mentioned in section 311.

A Court to which an application under section 311 of the Code of Civil Procedure, to set aside a sale held in execution of a decree, is made, is limited to the grounds set forth in that section. If the Court fails to find both a material irregularity in publishing or conducting the sale and consequent loss to the applicant, it is bound to dismiss the application and confirm the sale. It cannot set aside the sale upon other grounds not pleaded by the applicant. *Tassaduk Razul Khan v. Ahmad Husain (1)* and *Shirin Begam v. Agha Ali Khan (2)* referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal* for the applicant.

Pandit *Madan Mohan Malaviya* for the opposite parties.

KNOX, ACTING C. J., and DILLON, J.—On the 22nd of September 1897, certain property, the property of the judgment-debtor Kundan Lal, was sold by auction in execution of a decree held by Harbans Lal. After the sale had been held the judgment-

* Civil Revision, No. 35 of 1898.

(1) (1893) L. R., 20 I. A., 176.

(2) (1895) I. L. R., 13 All., 141.