

ostensibly on behalf of the judgement-debtor : yet the property in question must have been acquired by Kali Dat Pande, for the plaintiffs are proceeding against it in the present suit. Presumably Kali Dat got out of the difficulty in which he found himself, in consequence of his failure to complete the auction-purchase according to law, by coming to terms with the judgement-debtor, and the money raised by means of the mortgage-deed in suit was actually applied to the acquisition of the property for the purchase of which it had all along been intended. The mortgagee seems to have acted in good faith : there is no necessity for presuming a mistake of law on his part (as suggested in the memorandum of appeal before us), for he may simply have failed to notice the date on the receipt shown him by Kali Dat Pande. The failure of the latter to take necessary action within the period limited by law did not relieve him from all liability towards the court executing the decree: his preliminary deposit was forfeited, and he was liable to make good any loss which might occur on a resale. This liability he seems to have met by some private arrangement with the judgement-debtor, and by applying the money borrowed under the deed in suit substantially for the purpose for which it was actually raised. Under all the circumstances it would not be just to hold that the mortgagee had failed to make reasonable inquiries as to the necessity for the loan, or permit the sons to retain the property acquired by means of the loan while repudiating all liability for the same. This appeal therefore fails, and we dismiss it with costs.

Appeal dismissed.

Before Mr. Justice Byves and Mr. Justice Piggott.

DAN PRASAD AND ANOTHER (DEFENDANTS) v. GOPI KISHAN AND OTHERS
(PLAINTIFFS)*

1913
November, 18.

Civil Procedure Code (1908), order XL, rule 1—Injunction—Receiver—Application for temporary injunction as to property in suit—Order putting each party in possession of part pending the suit.

The defendants in a suit for partition made an application to the court touching the custody of the property the subject matter of the suit. The court thereupon directed that until the determination of the suit the plaintiffs should have the control and management of a portion of the property in suit, and the defendants of another portion. *Held* that the order was a legal order and a

*First Appeal No. 110 of 1913 from an order of B. J. Dalal, District Judge of Samgarh, dated the 23rd of January, 1913.

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proper order in the circumstances and not the less so because the court had acted *suo motu*. The order practically amounted to one under order XL, rule 1 of the Code of Civil Procedure, 1908.

IN this case the defendants in a suit for partition before the District Judge applied to the court for a temporary injunction concerning the custody of the property in suit. The District Judge on this directed that, until the determination of the suit, the plaintiffs should have the control and management of a portion of the property in suit and the defendants of another portion. The defendants appealed against this order, contending that the order was *ultra vires* and should not have been passed upon an application for a temporary injunction such as was before the court.

Dr. *Surendra Nath Sen*, for the appellants.

Mr. *W. Wallach*, *Munshi Govind Prasad* and *Munshi Parmeshwar Dayal*, for the respondents.

RYVES and FIGGOTT, JJ:—This is an appeal against an order of the District judge of Azamgarh, who, in the course of a suit for partition pending before him, has seen fit to direct that until the determination of the suit the plaintiffs shall have the control and management of a portion of the property in suit, and the defendants of another portion. The order is attacked before us on the ground that it is *ultra vires* and that it should not have been passed upon an application for a temporary injunction made by the defendants, which was pending before the District Judge when he passed the order under appeal. We think that, although the District Judge did not stop to consider precisely under what portion of the Code of Civil Procedure he was acting, he has in effect appointed the plaintiffs to hold possession as receivers of a portion of the property in suit and the defendants to do the same in respect of another portion. The order itself seems to us not *ultra vires*, but one covered by the provisions of order XL, rule 1. It has been argued before us, however, that the effect of this order is to remove the defendants from possession or custody of property from which the plaintiffs had not a present right to remove them. We think this objection does not lie in the mouth of the defendants in view of the attitude taken up by them in their written statement. As for the plea that the order complained of should not have been passed on the application for a temporary injunction, we find that it was as a

matter of fact passed upon a consideration of the allegations made in that application and in the reply filed on behalf of the plaintiffs and all the circumstances of the case as a whole. A court has a right to proceed under order XL, rule 1, where it appears to it to be just and convenient to do so, and the order is not improper or illegal merely because it was made *suo motu*. Finally it was contended before us that the order was made without notice to the parties and without giving the defendants in particular an opportunity of showing cause against it. We have heard counsel for the defendants at length on the facts of the case, and it seems to us that the order was a good and equitable order, suited to the circumstances of the case, and we are not, therefore, disposed to interfere with it merely on the ground that formal notice of the intention to take action under order XL was not given to the parties. The result is that this appeal fails and we dismiss it. We leave the parties to bear their own costs of the appeal.

Appeal dismissed.

Before Mr. Justice Ryves and Mr. Justice Piggott.

RANG LAL (DEFENDANT) v. ANNU LAL AND OTHERS (PLAINTIFFS)*
Act No. VII of 1889 (Succession Certificate Act), section 4—Succession certificate—Assignment of debt covered by certificate—Certificate also made over to assignees—Rights of assignees.

The widow of a separated Hindu obtained a certificate of succession for the collection of a debt due to her deceased husband. She assigned the debt and also handed over the succession certificate to the assignees. *Held* that the assignees were competent to sue and get a decree for the debt. The widow could undoubtedly assign the debt, and it was not necessary, even if it were possible, for the assignees to obtain cancellation of the certificate granted to the widow and the issue of a fresh certificate in their favour.

Karuppasami v. Pichu (1) distinguished. *Allahdad Khan v. Sant Ram* (2) not followed. *Durga Kunwar v. Matu Mal* (3) referred to.

THE facts of this case were as follows :—

On the 21st of February, 1898, Megh Nath as manager of a joint Hindu family executed a mortgage of three biswas odd in mauza Bhojpur, in favour of Mihin Lal and Duli Ram, who advanced

*Second Appeal No. 78 of 1913 from a decree of E. C. Allen, District Judge of Mainpuri, dated the 22nd of August, 1912, confirming a decree of Pratap Singh, Additional Subordinate Judge of Mainpuri, dated the 12th of January, 1912.

(1) (1891) I. L. R., 15 Mad., 419. (2) (1912) I. L. R., 35 All., 74.

(3) (1913) I. L. R., 35 All., 311.

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