ceived from the defendants under the purchase which is now sought to be set aside. We think it is established, therefore, that there was a debt for which the family was liable, and that the debt has been discharged in the manner above stated, *i. e.*, under legal necessity by the sale of this 1 pie share of the family property. It does not appear that the value of that share was greater than the debt to the liquidation of which it had been applied; and we think, therefore, that as to this 1 pie also the defendant's purchase can be maintained.

It is unnecessary, therefore, to consider the other points raised in appeal; and the result is that the decision of the Lower Court, so far as it regards the 1 anna 8 pie share, is affirmed, and the cross-appeal dismissed; and that the said decision of the lower Court, so far as it regards the 1 pie share, is reversed, and the plaintiff's suit in regard to that share dismissed. In other words, the plaintiff's suit is dismissed *in toto*. The appellants are entitled to their costs of this appeal.

There is, however, one other question of law which was argued in this case by the appellant, *viz.*, that the Court of Wards acting on behalf of the minor could not maintain the present suit, because the minor after attaining majority might ratify the father's acts. We think that this objection is quite untenable and that the Court of Wards have a perfect right to maintain this suit on the minor's behalf, if the defendant not having a good title to the property is in possession of the lands which belong to the minor.

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The 8th June 1870.

*Present:*

The Hon'ble L. S. Jackson and E. Jackson, *Judges.*

**General Mooktears—Notice of sale—Regulation VIII of 1819.**

Cases No 198 of 1870.

*Special Appeal from a decision passed by the Judge of East Burdwan, dated the 10th November 1869, reversing a decision of the Subordinate Judge of that District, dated the 9th July 1869.*

Hurry Kisto Roy (Plaintiff) *Appellant,*

*versus*

Motee Lall Nundee and others (Defendants) *Respondents.*

*Mr. W. A. Montriou* for Appellant.

*Baboo Onookool Chunder Mookerjee* for Respondents.

Where a general mooktear empowered to act on behalf of co-sharers does formal acts to enforce the rights of his principals (the zemindars), it is not necessary to trace back his authority in each case to the explicit sanction of every single member of the family. Mooktears must be considered to have a certain discretion, and unless the contrary is shewn to do such acts as come within the ordinary scope of their duty with authority.

In a case of a sale under Regulation VIII of 1819, where the putnee was a small piece of land upon which there was no town or village or cutcherry of any kind, and the peon stuck up the notice in the Collector's office and also at to the sudder cutcherry of the zemindar and obtained the receipt of the defaulter in the latter place, he was held to have carried out substantially, as far as he could, the provisions of the law regarding notice.

*L. S. Jackson, J.*—THIS was a suit by a putnee talookdar to obtain the reversal of a sale made at the instance of the zemindar on various grounds. The putnee, which consists of 62 beegahs of land, was created by a bynamah, dated 26th Kartick 1272, and the sale complained of took place on the 13th May 1868, or about two and a half years afterwards.

The plaintiff succeeded in the Court of the Subordinate Judge, but that decision was reversed on appeal by the Zillah Judge; and the strength of the contention raised by Mr. Montriou for the appellant lay in his objections to the mode in which the evidence and the facts of the case had been handled by the Lower Appellate Court.

I think the principal matters we have had to deal with in this appeal, were the misapprehension and misconception of the evidence by the Judge, which, it is contended, were sufficient to invalidate his judgment and to entitle the special appellant to a new trial; and the particular grounds on which the plaintiff is considered to have been entitled to the judgment of the Court, and upon which the Judge is considered to have miscarried, were, first, that the putneedar had paid the rent; next, that some of the zemindars under whom he held had not given their sanction to the proceedings; then, that the sale was void for want of due publication of the notice under Regulation VIII of 1819; and there was another, that the order of sale in the lotbundee under which this and other putnees were sold had been departed from.

As to the mode in which the Judge has treated the evidence, I am bound to say that I cannot consider his decision altogether satisfactory. There is no doubt considerable ground for observation in the description, so to say, which the Judge has given of the evidence, and some of the conclusions which he has drawn; and I think that if we could perceive, upon a consideration of the whole of the case and of the evidence that such misapprehension, as I suppose it must be called, had led to a failure of justice, we should be bound to remand the case and to order a new trial: but I am bound to say that, upon the whole case, it appears to me that the Judge has not come to an improper conclusion. The plaintiff came into Court to obtain the reversal of a sale held by the Collector under Regulation VIII of 1819. In commencing this suit, therefore, he had to contend, in the first place with the presumption which I think ought not to be lightly disturbed, that the proceedings of the Collector in conducting that sale had been correctly and regularly held; and, in the next place, he undertook to show that the sale had been brought about by fraud and misrepresentation.

We have been told by the learned Counsel that it is a serious matter to convict of perjury, as we should by implication do, one of the witnesses, who is also one of the zemindars in this case—Sreekristo; but it must not be forgotten that it is quite as serious a matter to convict by our verdict other of the zemindars, who are parties concerned of the fraud of which they would be undoubtedly guilty, if they had brought about this sale by suppression of the receipt of rent.

As to the question of the payment of rent, I think I am bound to say that the Judge had sufficient grounds for holding that the payment was not proved. Whether or not the Collector's and Commissioner's offices were the proper places in which the defaulter should have alleged that he had made payment, and whether or not he was in the first instance bound to apply for the summary enquiry provided in Clause 2 Section 14 Regulation VIII of 1819, I think it contrary to all experience of the dealings of suitors in this country to suppose that a man who was conscious of having paid the whole of his rent, should not, in complaining of the sale of his tenure, have conspicuously stated that fact from the very outset. The witness Sreekristo, who is one of the zemindars, has no doubt stated that he had received the rent in full, and, of course, if his evidence on this point can be believed, it would be not merely a strong piece of evidence, but would also be an admission upon the record of one of the defendants, and of a defendant who, as a co-sharer, might bind his co-sharers, the other defendants: but I think there is very good reason for refusing belief to that evidence. We are not now trying a regular appeal. I do not, therefore, propose to go fully into the considerations of fact which lead me to consider that the Judge was justified in refusing to believe that witness. It is sufficient to say that I think there was fair ground upon that evidence to refuse belief to Sreekristo.

Then, there is the question of the non-sanction of Sreekristo to these proceedings. I do not know what kind of sanction it is supposed that Sreekristo ought to have given. The application for sale in this case was made by a person who, it is admitted, was the am-mooktear of the co-sharers. If it was necessary for him to exhibit any distinct authority on the part of his employers, probably that authority must have been in writing, and not from Sreekristo alone but from the whole of the co-sharers. As far as my acquaintance with proceedings of this nature goes, I believe that persons who act as am-mooktears do habitually and constantly present petitions and applications to the Collector by virtue of their general authority, without showing any specific authority to act under Regulation VIII, of 1819.

Then we have the evidence of that mooktear. He states that he received the direct instruction of the eldest and managing member of the family, and that Sreekristo, although he did not give express instructions, was yet cognizant of what was going on, and gave his sanction impliedly by handing to the mooktear the various documents necessary to carry out that procedure. It may or may not be that the eldest member of the family, Ram Komul, had a direct interest in the particular property: but that would not be inconsistent with the fact of his giving instructions in a matter which concerned the family interests to the family mooktear; nor would the circumstance of the mooktear receiving verbal instructions from the eldest member of the family take away from the character of his act as the general mooktear empowered to act on behalf of the co-sharers. I think, therefore, there is

nothing in the want of direct sanction of Sreekristo.

But I am bound to say, further, that if in all the cases in which formal acts have to be done by mookteārs to enforce the rights of the zemindars, their principals, it were necessary to trace back the authority of the mooktear in each case to the explicit sanction of every single member of the family, both the mooktears and the officers of Government concerned would be very seriously embarrassed. I think that persons in the situation of ammooktears must be considered to have a certain discretion, and, unless the contrary is shewn, to do such acts as come within the ordinary scope of their duty with authority.

Then the next point is the non-publication of the notice. Mr. Montriou laid a great deal of stress on the use of the word "service" which occurs in the judgment. He contends that the officer who took this notice into the mofussil failed in his duty, because he brought back a return of "service" on the defaulter.

Now, what the Regulation requires in this matter is, that the zemindar shall cause to be stuck up in the Collector's office, and in his own sudder cutcherry; a general notice of all tenures of defaulters which he intends to be put up for sale by reason of default, and then for the information, as I understand, of each separate defaulter, an express notice is to be posted on the cutcherry or any principal town or village upon the particular putnee. The putnee in this case, it so happens, is not a distinct mouzah or collection of mouzahs, but a small piece of land upon which there is no town or village or cutcherry of any kind. It was impossible, therefore, to carry out literally the words of the Regulation in that respect. What the peon did was to take the notice to the sudder cutcherry of the zemindar, and there to obtain for it the receipt of the defaulter whom, it appears, he found there. It appears to me that in doing that he carried out substantially, and as far as he could, the provisions of the Regulation; because notice was given in the office of the Collector and the sudder cutcherry of the zemindar, which was a sufficient notice to purchasers to attend. A notice was also given to the defaulter himself, there being no town or village or cutcherry of his upon the property.

Then it is said that the putnees were not put up for sale in the order in which they stood in the lotbundee. I asked the learned Counsel whether it was contended that, by reason of this departure from form, the plaintiff had suffered any injury. He told us that it must be presumed to have resulted in some injury. He considers the price at which the property was sold was insufficient and that the plaintiff was the best judge of that matter.

It seems to me that that is not a sufficient answer to the question. In the analogous case under the Procedure Act, a sale is never set aside for informality in conducting the sale unless it be shown that substantial injury has been suffered. There is no authority for saying that the sale of a putnee talook must be set aside, because breach of form has taken place unless substantial injury has resulted.

But beside this, we see that this property for which 21 rupees was paid by way of bonus has been sold for 180 rupees. Mr. Montriou suggested that the land might have been uncultivated, and that the consideration given in the first instance would be no guide to the value of the property on which jungle was possibly growing at that time. As to that, the putnee had only been in existence two and a half years. It is not likely that the plaintiff could have done any thing in that time to improve the property to any large extent. But, moreover, the amount of "*pou*" (consideration-money) given on these occasions is almost entirely regulated by the rent reserved. If a putnee is granted at what is a fair rent for the land, the *pou* is usually small; but if on the other hand the zemindar's necessities oblige him to sacrifice a large portion of the rent he might receive, he always gets consideration for it in the shape of a larger sum of money down; and, consequently, I see no reason for supposing that any injury accrued to the plaintiff from this departure from the order in the lotbundee.

On the whole case, therefore, it seems to me that there is no error in the decision of the Judge, such as would entitle us to set aside his judgment, and order the sale of the plaintiff's putnee to be set aside. The special appeal must be dismissed with costs.

*E. Jackson, J.*—I concur with Mr. Justice Jackson, both in the conclusions at which he has arrived and in the argument which he has stated for those conclusions. I am

quite satisfied on all the three points on which this special appeal has been argued before us, that the Lower Appellate Court had before it sufficient evidence upon which it could legally arrive at the judgment at which it has arrived upon each of these points. On the question of arrears, I think there can be very little doubt that the decision is quite correct : in fact, we have heard a great portion of the evidence upon it read. Upon the question of authority, there is evidence that Sreekristo did assent to the application to the Collector—namely, the evidence of the mooktear. As to the publication, I think that all necessary publication under the law, considering the special circumstances of this case, was proved by the evidence before the Court. I would, therefore, also dismiss the appeal.

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The 8th June 1870.

*Present:*

The Hon'ble G. Loch and Sir Charles Hobhouse, *Bart., Judges.*

**Execution — Jurisdiction — Res judicata—Section 11 Act XXIII of 1861.**

Case No. 149 of 1870.

*Special Appeal from a decision passed by the Officiating Judge of Rungpore, dated the* 18*th December* 1869, *reversing a decision of the Subordinate Judge of that District, dated the* 3*rd December* 1868.

Jogendro Narain Koonwar (Defendant) *Appellant,*

*versus*

Ranee Surno Moyee (Plaintiff) *Respondent.*

*Baboo Tarucknath Dutt* for Appellant.

*Baboos Sreenath Dass, Bhuggobutty Churn Ghose,* and *Motee Lall Mookerjee* for Respondent.

Possession of certain lands having been given to a decree-holder in execution, the judgment-debtor appeared before the Court which had jurisdiction to execute the decree, and complained that illegal possession had been taken of land not covered by the decree. The Court determined that the decree did cover the land and rejected the complaint. The judgment-debtor then brought the present suit to recover possession of the excess land which had been made over to the decree-holder.

HELD that the question was one which arose in the former suit between the parties, and which related to the execution of the decree in that suit, and must, therefore, under Section 11 Act XXIII of 1859, have been determined by the Court executing the decree, and could not be gone into in this separate suit.

*Hobhouse, J.*—THE plaintiff in this suit, who is the special respondent before us, sued to recover certain lands under the following circumstances. The defendant, who is the special appellant before us, held a decree of date the 17th July 1860 for the recovery of certain lands from the plaintiff within certain boundaries specified in the decree. In execution of that decree, that is, on the 22nd April 1856, the present defendant, then the decree-holder, took possession of the lands, now in dispute, averring that they were covered by the decree. This possession, it is admitted, was given to the present defendant through an officer of the Court—that is, through the Civil Court Ameen. Thereafter, that is, sometime in May 1866, the present plaintiff, then the judgment-debtor, appeared before the Court which had jurisdiction to execute the decree of the 17th July 1860, and complained that the present defendant, then the decree-holder, had illegally taken possession of the lands now in dispute, because they were not covered by the decree of the 17th July 1860. The Court determined that the decree in question did cover the lands in question, and rejected the present plaintiff's complaint to the contrary. This was on the 28th May 1866.

In the present suit, the plaintiff sues to recover possession of these same lands, setting up as his cause of action the decision of the Court in execution of decree of the 28th May 1866. The first Court thought the suit would not lie and dismissed it. The Lower Appellate Court is of opinion that the suit will lie, and has remanded the case for a decision on the merits.

In my opinion, the Lower Appellate Court is in error. By the provisions of Section 11 Act XXIII of 1861, it is declared that certain questions as to mesne profits are to be determined by the Court executing the decree. And then the Section goes on to provide, in so many words, as follows :— "And any other questions arising between "the parties to the suit in which the decree "was passed, and relating to the execution "of the decree, shall be determined by "order of the Court executing the decree, "and not by separate suit, and the order "passed by the Court shall be open to ap- "peal."

Now it is to be remarked that these last provisions of this Section were enacted by