

*Nath Mukherji v. Anath Nath Deb*, that the plaintiffs are estopped from questioning the title of the Roys in this case.

That the application of the doctrine of estoppel in this case does not lead to any injustice will be further seen from the following considerations. The heirs of Abdul Ali are undoubtedly estopped from denying the title of the Roys. As for the plaintiffs, they not only allowed Amirunnessa to state in her petition of compromise in the claim case, that the properties in dispute had been obtained by her from her husband by purchase, and accepted the compromise upon the basis of that statement; but in the sale proclamation pursuant to which they made their purchase, they caused a notice to be inserted that those properties were liable under the mortgage to the Roys; and that a decree had been obtained under that mortgage. They had the benefit of that notification, which obviously enabled them to purchase properties yielding, according to their own witness, Anand Mohun, upwards of Rs. 1,200 a year for the grossly inadequate sum of Rs. 900; and they cannot now be heard to say that the mortgage is not binding on them. They cannot be allowed to affirm and disaffirm the same transaction just as it suits their purpose.

The result is that this appeal must be allowed, and the decree of the lower Court reversed, and the plaintiff's suit dismissed, with costs in both Courts.

*Appeal allowed.*

J. V. W.

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## ORIGINAL CIVIL.

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*Before Mr. Justice Wilson.*

**BROJOLALL SEN v. MOHENDRO NATH SEN AND OTHERS.\***

*Practice—Partition proceedings—Form of order for costs—Order for execution.*

1891

January 5.

Where one of the parties to a partition suit bears all the costs of the proceedings subsequent to decree, and the other parties make default in payment to him of their respective shares of the costs, he is not entitled to

\* Application in Suit No. 423 of 1885.

1890

KISHORY  
MOHUN  
ROY  
v.  
MAHOMED  
MUJAFFAR  
HOSSEIN.

1891 embody in his order against them for payment an order for execution. He  
 must first obtain an order for payment, and, if payment be not obtained,  
 application for execution may be made.

BROJOLALL  
 SEN

v.  
 MOHENDRO  
 NATH SEN.

THIS was an application in a partition suit. On the 26th July 1886 a decree was made in the suit for the partition of the joint-family estate which formed the subject matter of the litigation. By this decree it was declared that the plaintiff and the three defendants were each entitled to one equal fourth part of the property, and it was ordered that a commission of partition should issue and the costs of the commission, etc., be borne by the parties in proportion to the value of their respective shares. The plaintiff took no further steps in the matter, but at the instance of Mutty Lall Sen, one of the defendants, the commission was issued and the estate partitioned. Mutty Lall Sen had the conduct of the partition proceedings, paid all the costs, and had the *allocatur* filed and served on each of the other parties to the suit. He then demanded from them payment of their respective shares of the costs incurred by him, and, as they made default in payment, obtained from the Court a rule calling upon them to show cause why they should not pay to him their proportionate shares of the costs, or why execution should not issue for the recovery of these sums.

Mr. *Acetoom* for Mutty Lall Sen—The rule is correctly drawn up. Mr. Belchambers, at page 361 of his ‘Practice,’ lays down, on the authority of an unreported decision, that in such a case as this the mode of proceeding to compel payment is by execution, preceded by a rule *nisi*, in which the amount claimed is specified. This must mean that the rule should be made absolute and execution should issue at once.

The other parties were not represented.

WILSON, J.—You are entitled to an order absolute for payment of the moneys mentioned in your affidavit, and for payment of the costs of this application. You cannot now get an order for execution. There must first be an order of Court for payment, and, if payment be not obtained, application for execution may be made.

Attorney for the applicant: Baboo *Ohoy Chunder Chowdhry*.