

[APPELLATE CIVIL JURISDICTION.]

*Miscellaneous Special Appeal No. 24 of 1872.*1873.
July 7

NAGINDA'S DEVCHAND, Assignee of a decree

obtained by JAYACHAND and PARBHUDA'S. *Appellant.*

NA'THA' PITA'MBAR and another, heirs and

representatives of ASHA'RA'M *Respondents.**Decree—Execution—Sec. 11 of Act XXIII. of 1861—Reversal of a
Decree—Property to be restored how valued.*

A obtains possession of property under a decree, the decree is subsequently reversed :—

Held 1st, that A must restore the property itself, or its actual value as determined by evidence, and not the amount for which it may have been sold ; and 2ndly, under Sec. 11 of Act XXIII. of 1861, that a claim for its restoration need not be the subject of a separate suit, but may be enforced in a miscellaneous proceeding.*

THIS was a miscellaneous special appeal against the order of F. D. Melvill, Judge of the District of Ahmadabad, reversing the order of the Subordinate Judge of Borsad.

The facts of the case are as follows :—

Ashárám obtained, on the 25th November 1867, a decree against Ráyachand, Jayachand, and Parbhudás, directing that Ashárám should retain possession of certain bales of cotton yarn given him by Jayachand and Parbhudás, that he should get from these two persons some other similar bales, and that, in the event of the latter failing to deliver them, Ashárám should satisfy his debt by a sale of the bales already in his possession, and from the three defendants personally. On appeal this decree was reversed, so far as it regarded Parbhudás and Jayachand, on the 24th February 1871. On the 23rd November following the High Court confirmed the decree of the Appellate Court.

* *Note.*—The representatives of the original parties come within the meaning of “parties” in Sec. 11 of Act XXIII. of 1861 (*Buddu Rámáiya v. Venkaiva*, 3 Madras High Court Reports 263).—Ed.

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In the meantime, Jayachand and Parbhudás having delivered the bales which they were directed to deliver by the decree of the Court of first instance, they were sold, and the proceeds paid to Ashárám ; but, on this decree being reversed by the Appellate Court's decree, they applied for the restoration of the bales or their value. This application is now prosecuted by the appellant Nagindás, to whom the two defendants, Jayachand and Parbhudás, have assigned the decree in their favour.

The application was opposed by Ashárám's representatives on the ground, *inter alia*, that in execution proceedings the right of the assignee, Nagindás, to a re-delivery of the bales or their value could not be inquired into, but must form the subject of a regular suit. This contention was overruled by the Subordinate Judge of Borsad, but allowed by the District Judge of Ahmadabad in appeal.

A special appeal having been preferred ; it was heard by MELVILL and WEST, JJ.

Shántárám Náráyan appeared for the special appellant.

Nagindás Tulsidás appeared for the special respondents.

PER CURIAM :—The Court thinks that Ashárám's representatives are bound to restore the property taken in execution or to pay the value thereof : and by the value must be understood the actual value of the property, at the date of the execution sale, as the same may be established by evidence and not the amount for which the property may have been actually sold. It is objected that the present claim cannot be enforced in a miscellaneous proceeding, but must be the subject of a separate suit ; but, looking to the provisions of Sec. 11 of Act XXIII. of 1861, the Court thinks that this objection cannot be maintained.

The Court reverses the order of the District Judge and restores that of the Court of first instance.

Costs of both appeals in this Court and the District Court on Ashárám's representatives.

Order accordingly.