1865.
Oct. 5.

Civil Petition.

JA'NOJI BA'NA'JI .....*Applicant.*
VYANKATESH SHRI'NIVA'S..... *Respondent.*

Execution of Decree—Question arising between the Parties—Act XXIII. of 1861, *Sec.* 11.

Held that a question raised for the first time between the parties to a decree, at the time of its execution, although not expressly reserved in that decree for determination at the time of its execution, may be inquired into and determined by the Court executing the decree, under Sec. 11 of Act XXIII. of 1861.

THIS was an application for the reversal of an order passed in appeal by J. Gibbs, District Judge of Puná, in the matter of the execution of a decree.

Jánoji filed a suit, on a mortgage bond, against Vyankatesh Shrínivás, in the Munsif's Court at Junír in 1851; and obtained a decree, which directed that the defendant should pay the plaintiff the amount claimed with costs; and that in default of this, the plaintiff should, under the terms of the mortgage bond, have possession of the mortgaged land, until the principal sum of Rs. 100 had been paid. The defendant having failed to pay the amount, the plaintiff entered into possession in 1863.

On the 6th of April 1864, the defendant applied to the Munsif of Junír: praying that the land might be ordered to be restored to him: he being ready to pay the Rs. 100, as required by the decree.

This application was opposed by Jánoji, who stated that, under an agreement passed by the defendant, he was to hold the land, and the defendant was to pay the assessment on it; that the defendant had not paid the assessment for eleven years; and, therefore, could not recover the land from him, unless he paid him Rs. 914 then due, including the principal amount of the decree, the assessment, and interest on the same.

The Munsif ordered the defendant to pay to the plaintiff Rs. 567-7-8 for the redemption of his land: namely, Rs. 100,

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the amount of the decree; Rs. 264, on account of the assessment on the mortgaged land for eleven years; and Rs. 204-7-8, as interest on the latter sum.

The defendant appealed against this order to the District Judge, who, finding that "the decree clearly ordered the plaintiff to retain possession of the mortgaged land, until the principal sum of Rs. 100 had been paid, and no longer;" and finding no provision whatever made in that decree for any payment to be made by the defendant to the plaintiff on account of the assessment, which the plaintiff's vakíl admitted had been paid by the plaintiff subsequent to the passing of the decree; and being, therefore, of opinion that the "plaintiff was not entitled to retain the land after the defendant had paid him that sum" (Rs. 100), amended the lower court's order accordingly: directing the plaintiff "to restore the land to the defendant, on his paying the plaintiff Rs. 100 only."

The plaintiff applied to the High Court, for the reversal of this order of the District Judge, on the 3rd of August 1865, when a *rule nisi* was granted.

Nánábhái Haridás now (Oct. 5) appeared to show cause:—It does not appear upon what grounds the *rule nisi* in this case was granted. The application for it seems to have been based principally upon this ground, that the Judge misconstrued the Munsif's decree, in holding that it did not award anything more than Rs. 100 and costs. It appears, however, that the Judge has correctly interpreted the decree. There is no direction in it as to the payment of any assessment, either by one party or by the other; and although the plaintiff may have a claim against the defendant for any sums of money paid by the former on account of the latter; yet, since the decree is silent on the subject, the court executing it cannot order the payment of anything more than what is expressly awarded in it. Its duties are entirely ministerial, and it must execute the decree as it is. The claim which the plaintiff now puts forth, if true, is a new cause of action; and the proper course for him to adopt is to institute a

fresh suit for it. It has no reference to the execution of the decree as it stands.

Dhirajlál Mathurádás, contra :—Sec. 11 of Act XXIII. of 1861 empowers the court executing the decree to inquire into and determine every question arising between the parties to it; and, as it prohibits a fresh suit in respect of the same, the course adopted by the plaintiff is the only one open to him.

TUCKER, J. :—We are of opinion that, under Sec. 11 of Act XXIII. of 1861, the lower court had the power of inquiring into and determining the question which has now been raised between the parties to this decree, a decree which, in consequence of the imperfect form in which it has been drawn up, the defendant seeks to use for the purpose of evading his ordinary liability under the original contract of mortgage, and to the detriment of the plaintiff, in whose favour the said decree was passed.

The plaintiff is a mortgagee, who has obtained possession of the land mortgaged, under a decree of a Civil Court. The defendant, the mortgagor, seeks, in virtue of that decree, to release the land, on payment of the principal of the original debt, which was declared in the said decree; but the mortgagee objects, on the ground, that he has now a lien upon the land for the assessment, which he has been obliged so pay, in consequence of the mortgagor having failed to do to, in conformity with the terms of the original contract.

We consider that the lower appellate court, before directing the restoration of the land, should have ascertained whether any sum with interest was justly due to the mortgagee on the account which has been stated; and we, therefore, return the case to the lower appellate court, with this declaration of our opinion, in order that the Judge may review his former order; and determine a question relating to the execution of a decree which has legitimately arisen between the parties, in consequence of acts done subsequent to the passing of the said decree.

WARDEN, J., concurred.

Case remanded.