

1875. as to the Muhammadan law which the District Judge, in his judgment, states as made on their behalf.

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ZIA'UN-  
NISSA.

We also deem it unnecessary to give any opinion on the question as to whether or not Amir-un-nissá had been a slave. Assuming that she had been so, as contended on behalf of the plaintiff, we, for the reasons already stated, hold this suit to be unsustainable.

The decree of the District Judge must be affirmed, with one set of costs of this Regular Appeal, to be paid by the plaintiff to the defendants.

*Decree affirmed.*

[APPELLATE CIVIL JURISDICTION.]

*Special Appeal No. 423 of 1872.*

1873.  
August 13.

RA'VJISHIVRA'M JOSHI... (*Original Plaintiff*) *Appellant.*

KA'LURA'M, son of MALUK-  
CHAND, deceased, his widows } (*Original Defendants*)  
and heiresses, CHABA'BA'I } *Respondents.*  
and BHAGA'BA'I, and another.)

*Decree—Execution—Application after decree—Act XXIII. of 1861, Section 11*  
*—Mortgage—Redemption.*

An application to the court, passing a decree for possession in favour of the heirs of a mortgagee, for further execution thereof, by taking an account, is not the proper mode for the mortgagor to redeem the mortgaged lands and to recover possession thereof.

The proper course for a mortgagor who seeks for an account and redemption, or for redemption alone, is to bring an independent suit for that purpose.

*Jénoji v. Byaukatesh* (2 Bom. H. C. Rup. 371) over ruled.

THIS was a case referred for the decision of a Full Bench by WESTROPP, C.J., and NA'NA'BHA'I HARIDA'S, J. The reference was heard by a full bench consisting of WESTROPP, C.J., MELVILLE, WEST, and NA'NA'BHA'I HARIDA'S, JJ.

*Bahiravnáth Mangesh* for the appellant.

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*Dhirajlál Mathurádás* (Government Pleader) for the respondents.

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The facts and arguments sufficiently appear from the following judgment of the full court delivered by

WESTROPP, C.J.—This is a suit for the redemption of a mortgage. Kálurám (whose widows are, as his heirs, the defendants and respondents here) having, as heir of the mortgagee, obtained, in regular appeal in the Zillah Court, a decree, on the 12th September 1850, against the mortgagor for Rs. 262-13-0 due in respect of the mortgage, with this direction, “and it is further ordered that if the defendant (the mortgagor) fail to pay, the plaintiff is to be placed in possession for the amount claimed” (Rs. 262-13-0). That was the ordinary decree to put an unpaid mortgagee in possession, which possession he might retain until he was paid in full. Mr. Dhirajlál Mathurádás, for the present defendants, made a preliminary objection that this suit for redemption will not lie, inasmuch as, he contends, the mortgagor’s only proper mode of recovering possession is by an application, in the possession suit, for further execution of the decree of the 12th of September 1850, which course, he says, is prescribed by Section 11 of Act XXIII. of 1861, and was successfully pursued in the following unreported miscellaneous cases: *Gangákrishna v. Nánabhái*, decided by SAUSSE, C.J., and TUCKER, J., on the 13th April 1866; *Dattátraya v. Rangu Shámji*, decided 4th April 1868; and *Himatsing v. Gangádas and others*, decided 28th April 1870. Those authorities were cited to Nánabhái Haridás, J., and myself when this special appeal first came before us in the Division Court on the 23rd of July last, and we, being of opinion that they were unsustainable in law, and not being inclined to follow them, referred to a Full Bench the following questions:—

1st.—Whether an application to the court which passed the previous decree for possession in favour of the mortgagee’s heir, for further execution thereof by taking an

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2nd.—Whether, if such be the case, a separate suit for redemption is prohibited by Section 11 of Act XXIII. of 1861.

We are unanimously of opinion that the first question must be answered in the negative.

In addition to the cases already mentioned, *Jánoji Bánáji v. Vyankatesh Shrinivás (a)* was cited to the Full Court in support of Mr. Dhirajlál Mathurádás's objection. We think, however, that neither it nor the three unreported cases can be sustained, inasmuch as, when Kálurám, the heir of the mortgagee, was put into possession of the mortgaged premises, the decree of the 12th September 1850 was fully executed, the suit in which that decree was made being really nothing more than a suit in the nature of an ejectment, by an unpaid mortgagee, of the mortgagor from the mortgaged premises. A proceeding for redemption of those premises is not a question "relating to sums alleged to have been paid in discharge or satisfaction of the decree or the like, or a question relating to the execution of the decree," which we hold to have been fully executed when Kálurám, the heir of the mortgagee, was put into possession under the decree. Were we to hold that a mortgagor might apply, in a possession suit, for an account and redemption on the ground that such a proceeding was in further execution of the decree for possession in favour of the mortgagee, it would follow that the mortgagor would be barred, if the mortgagee had been in possession for three years under that decree—a result which we feel certain the Legislature never contemplated, and which would be quite contrary to the spirit of clause 15 of Section 1 of Act XIV. of 1859 and Articles 147, 148, and 149 of Schedule II. of Act IX. of 1871.

The answer of this Court to the first question being in the negative, the second question does not arise. It follows, as a necessary consequence of our answer to the first question, that the proper course for the mortgagor who seeks for an account and redemption, or redemption alone, is to bring an independent suit for that purpose.

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## [APPELLATE CIVIL JURISDICTION.]

Miscellaneous Special Appeal No. 24 of 1874.

1875.  
January 15.

RA'MCHANDRA BALLA'L ..... *Plaintiff and Appellants.*  
BA'BA'ESGONDA and others. *Defendants and Respondents.*

*Decree—Execution—Application after decree—Act XXIII. of 1861, Section 11—Mortgage—Possession—Redemption.*

A mortgagee was put into possession of the mortgaged property, under a decree obtained by him against the mortgagor, to the effect that the mortgage should remain in possession until the mortgage debt was paid. The mortgagor subsequently paid into Court the money due under the mortgage decree, and applied to be restored to the possession of the mortgaged property. Both the lower courts granted the mortgagor's application.

On special appeal, *held* (following the decision of the Full Bench in *Rávjí Shivrám Joshi v. Kálorám Malukchand*, *ante* p. 161) that such an application was not the proper mode for the mortgagor to redeem the property and to recover possession from the mortgagee, the previous decree for possession having been fully executed when the mortgagee was put into possession.

THIS was a miscellaneous special appeal from the order of H. J. Parsons, Assistant Judge at Ratnágiri, affirming the order of the Munsif of Málwan.

The facts of the case are briefly these:—In 1862 Rámchandra sued the defendants, Bábu and others, on a mortgage, and obtained a decree against them, that he was to be put into, and continue in, possession of the mortgaged property until the defendants paid him Rs. 499. Under that decree, Rámchandra was put in possession of the property in 1872. On the 16th October 1872, the defendants paid Rs. 499 into court, and applied for restoration of the possession of their property. This application was made under Act XXIII. of