

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.

1873.

RA'VJI SHIV-  
RA'M JOSHI.  
v.  
KA'LURÁ'M.

## [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 *Ráji 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

1875.

RA'MCHAN-  
DRA BALLA'L  
v.  
BA'BA'  
ESGONDA.

1861, Section 11. The plaintiff contended that his mortgage decree against the defendants had been fully executed when he obtained possession under it, and that they should bring a fresh suit to redeem the property, and not seek to obtain it by an application under his mortgage decree. Both the lower courts ordered the plaintiff to receive the money and restore the mortgaged property to the defendants. In special appeal it was again contended that the decree obtained by the plaintiff had been completely executed, when he was put into possession, and that it could not be executed a second time at the instance of the defendants, who should bring a regular suit to redeem the property.

The special appeal was argued before WESTROPP, C.J., and KEMBALL, J., on the 15th January 1875.

*Ghanashám Nilkanth* for the appellant :—The question raised in the present case has already been decided by a Full Bench of this Court in special appeal No. 423 of 1872, decided on the 13th August 1873.

*Shántáráam Náráyan contra.*

WESTROPP, C.J. :—The Court reverses the order of the District Judge of the 21st June 1873, and the order of the Subordinate Judge of the 17th January 1873, with costs. This decision is in conformity with that of the Full Bench in S. A. No. 423 of 1872 (*Rávjí Shivráam Joshi v. Káalurám Malukchand*), made on the 13th of August 1873. That was a suit by a mortgagor for redemption. The mortgagees, who had obtained possession under a decree in a suit brought by him for that purpose against the mortgagor, took a preliminary objection that such suit would not lie, inasmuch as the mortgagor's proper mode of recovering possession was by an application to the court in the former suit for further execution of the decree therein. Such an application had been successful in some unreported cases as well as in a case reported in 2 Bom. H. C. Rep. 371. Those cases, however, seemed to the Division Court to be unsustainable, and it referred to a Full Bench the question, whether an application to the Court, which passed the previous decree

for possession in favour of the mortgagee, for further execution thereof, by taking an account of what was due to the mortgagee, and, on payment by the mortgagor of the amount found due, by restoration to him of the mortgaged premises, is, as was held in those cases, the proper mode for the mortgagor to redeem the lands from the mortgagee and to recover possession of them from him. The Full Bench, principally on the ground that the previous decree for possession had been fully executed when the mortgagee was put into possession, overruled these cases, and answered the question referred to it in the negative. That decision completely governs the present case.

*Orders of the lower courts reversed with costs.*

1875.  
 RA'MCHAN-  
 DRA BALLA'L  
 v.  
 BA'BA'  
 ESGONDA.

[APPELLATE CIVIL JURISDICTION.]

March 3.

*Regular Appel No. 76 of 1872.*

KESHAV GOPA'L GINDE } *Defendants and Appellants.*  
 and two others..... }

RAYA'PA' and another ... *Plaintiffs and Respondents.*

*Partnership—Rights of a deceased partner—Adjustment of a partnership account—Payments by partners—Presumption—Execution—Seizure of partnership property in execution against one partner.*

A suit based on the right of a deceased partner cannot be limited to a demand for his share in the proceeds of property alleged to have come into the possession of the partnership during its existence. The agreement on which the partnership was formed, the amounts advanced and drawn out by the several partners, and the subsisting liabilities and assets, if any, must all be taken into account, and the suit must demand such a sum, if any, as, on a general account, and an account between the deceased partner and the co-partnership, being taken, shall appear to be due.

Payments made by the different partners of a firm are presumed to have been made out of the funds of the firm where the contrary is not proved by any satisfactory evidence, and when a firm consisting of two members is dissolved by the death of one partner, the presumption is that the deceased was entitled to a moiety of the existing assets.

It is an improper way of executing a decree obtained personally against one of the several partners of a firm to seize part of the partnership property, to sell that part, and then distribute the proceeds between the executing creditor and the other partners of the firm.