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Magistrate in his explanation argues, that section 44 would have justified some such order as the order made in this case; but the scope of that section is different from, and far larger than, that of section 133.

We hold then that the order made in this case by the Magistrate was not an order which the Magistrate was lawfully empowered to promulgate within the meaning of section 188. We therefore set aside this conviction and order the fine, if paid to be refunded.

APPELLATE CIVIL.

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July 7.

Before Mr. Justice Blair and Mr. Justice Burkitt.

HAR PRASAD AND ANOTHER (OPPOSITE PARTIES) *v.* SHEO RAM AND ANOTHER (APPLICANTS).*

Civil Procedure Code, section 244—Execution of decree—Mortgage—Attempt to obtain redemption of a usufructuary mortgage by means of an application in execution.

Certain mortgagees held a mortgage which, in its inception was a simple mortgage, but which was to become a usufructuary mortgage upon non-payment of the mortgage debt by a certain date. The mortgage debt was not paid within the time limited. The mortgagees sued on the covenant in their bond and obtained a decree for possession, declaring them entitled to remain in possession until the mortgage debt was satisfied from the usufruct. Some time after the mortgagees had got possession under this decree, the mortgagors applied, ostensibly under section 244 of the Code of Civil Procedure, for recovery of possession of the mortgaged property and for payment of a large sum of money, which they alleged the mortgagees had collected as profits in excess of what was due under the mortgage.

Held, that such an application would not lie. If the allegations of the mortgagors were true, their proper remedy was by suit for redemption and not by application in the execution department. *Ravji Shivram* v. *Kaluram* (1), *Ram Chandra Ballal* v. *Baba Esgonda* (2), and *Narsinha Manohar* v. *Bhagvantrav* (3), referred to.

THE facts of this case are fully stated in the judgment of the Court.

* First Appeal No. 52 of 1898 from an order of F. W. Fox, Esq., District Judge of Jhansi, dated the 24th December 1897.

(1) 12 Bom., H. C. Rep., 160. (2) 12 Bom., H. C. Rep., 163.
(3) I. L. R., 14 Bom., 327.

Babu *Durga Charan Banerji*, for the appellants.

Babu *Satya Chandar Mukerji*, for the respondents.

BURKITT, J., (BLAIR, J., concurring).—This is an appeal against an order of the District Judge of Jhansi, passed under section 244 of the Code of Civil Procedure, directing that possession of certain mortgaged property be restored by the appellants mortgagees to the applicants in execution (the mortgagors), and also directing that the appellants pay to their mortgagors a sum of Rs. 4,575, being the surplus received by the appellants as mortgagees over and above the amount due on their mortgage.

The preliminary history of this case is, that in February 1892, Sheo Ram and others, respondents to this appeal, mortgaged certain immovable property to Har Prasad and others, appellants here. The mortgage was a simple one; but there was a stipulation that if the money due on it were not paid by a certain date the mortgagees would be entitled to be put into possession of the property. The money was not paid. The mortgagees thereupon instituted a suit for possession of the property and obtained a decree in their favor in June 1893, directing them to be put in possession of the property, to hold possession until the amount due on the bond with interest had been satisfied from the usufruct. The mortgagees took out execution of that decree and obtained possession under it in August 1893. Nothing more was done in the matter of executing the decree till March 1897.

In that month the mortgagors, the judgment-debtors under the decree, made an application (which they described as being an application under section 244 of the Code of Civil Procedure) to the District Judge. In that application they recited the passing of the decree mentioned above, and the possession over the mortgaged property obtained by the mortgagees in execution thereof. They then set forth that the amount due under the decree had been much more than satisfied by the usufruct of the property while in the possession of the mortgagees, and they asked the Court to direct the property to be restored to them, and to compel the mortgagees to refund to them some Rs. 12,876 which, they

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alleged, the mortgagees had received over and above the amount due on their decree.

In reply to this petition the present appellants naturally raised the plea that the matter of the petition was one which could not be decided in execution proceedings on an application under section 244 of the Code of Civil Procedure.

The learned District Judge framed an issue for trial on that plea, but somehow failed to come to any finding on it. Had he considered the question, he probably would have been spared the trouble of making the "examination of long and complicated accounts" mentioned in his order of July 2nd 1897. He, however, left the preliminary question undecided, and having examined the accounts, he passed an order that possession should be restored to the applicants, and that the appellants here should pay them a large sum of money.

Hence this appeal, in which it is contended that the matter dealt with by the lower Court was not a question which could be entertained under section 244 of the Code of Civil Procedure. It was argued for the appellants that the proper course for the applicants was to have instituted a regular suit for redemption of the mortgage, and that they were not entitled to obtain a redemption decree under the disguise of an application in execution under section 244 of the Code. The appellants urged that the execution of the decree obtained by them for the possession of the mortgaged property was fully completed when, on their application for execution of that decree, they were placed in possession under it in August 1893, and that thenceforth the position occupied by them and the applicants respondents was that of mortgagees in possession and mortgagors, and not merely that of decree-holders and judgment-debtors amenable to the jurisdiction given by section 244 of the Code of Civil Procedure. The applicants indeed must, we think, be held to have admitted some of the propositions stated above, for in their application under section 244 they state in the first paragraph that the decree obtained by the applicants was a decree for possession as mortgagees, entitling them to remain in

possession till the amount due to them on the mortgage had been paid off by the usufruct.

For the respondents it was contended that the case comes under clause (*c*) of section 244, because the Court which passed the decree specified in its decree the amount due on the mortgage and gave the mortgagees a decree for possession until that amount was repaid. The argument is that an execution Court is empowered under that clause to take accounts and ascertain whether the amount decreed had or had not been paid off. In that contention we are unable to concur. We are of opinion that the limitation as to the period of enjoyment was inserted in the decree to indicate the title by which the mortgagees retained possession, and for no other purpose, and we are unhesitatingly of opinion that all proceedings relating to the execution of the decree came to an end, and that the decree was fully executed when the appellants were put in possession (as mortgagees) of the property by virtue of the decree. Nothing more remained to be done under it, the decree having been fully satisfied. We fail to see how the matter of this application to the learned Judge can be said to be a question relating to the execution, discharge or satisfaction of the decree. That decree had been fully executed and satisfied; nor can the word "discharge" be applicable to such a case as this in which the decree has been executed and satisfied. In the opinion expressed above we are supported by several decisions of the High Court of Bombay. The first of those cases to which we would allude is that of *Ravji Shivram* v. *Kaluram* (1), a decision of a Full Bench of that Court. That case is conversely on all fours with the present case. On a suit by a mortgagee, the mortgage money being unpaid, he obtained a decree for possession of the mortgaged property "for the amount claimed," which, the High Court observed, was "the ordinary decree to put an unpaid mortgagee in possession, which he might retain till he was paid in full." Subsequently the mortgagor instituted a suit for redemption. In reply to the claim it was contended for the

(1) 12 Bom., H. C. Rep., 160.

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mortgagee that the mortgagor was seeking a wrong remedy, and that his "only proper mode of recovering possession is by an application in the possession suit for further execution of the decree" in that suit.

This case is then, it will be observed, exactly the converse of the present case. It was held by the Full Bench, overruling the mortgagee's contention, that when the mortgagee was put in possession of the mortgaged premises, the decree for possession 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, and the Court went on to say that a "proceeding for redemption of those premises is not a question" relating to the discharge or satisfaction of the decree, nor "a question relating to the execution of the decree, which we hold to have been fully executed when the heir of the mortgagee was put into possession under the decree."

The Full Bench accordingly held that the proper mode for the mortgagor to redeem the lands and recover possession was *not* by an application to the Court which passed the decree for further execution thereof by taking the account, etc.

This case (decided in 1873) was, no doubt, one under the old Codes of 1859 and 1861. We cannot, however, see any material difference (as far as the question here is concerned) between the corresponding sections of the present and of the former Code. The ruling just cited was followed and approved of in *Ram Chandra Ballal* v. *Babá Esgonda* (1) and in *Narsinha Manohar* v. *Bhagvantrav* (2), the latter of which cases was decided long after the present Code of Civil Procedure had come into force.

Concurring to the fullest extent in the rule laid down in those cases, we are of opinion that the application made by the respondents to the District Judge was one which could not be entertained under section 244 of the Code of Civil Procedure, and that it should have been rejected.

(1) 12 Bom., H. C. Rep., 163. (2) I. L. R., 14 Bom., 327.

There is another aspect of this case which should be referred to. It might be most disastrous (as noted in the case of *Ravji Shivram* v. *Kaluram* cited above) to persons in the position of the respondents, if it were to be held that their proper course to obtain redemption of the mortgaged property in cases like the present was by presenting an application for further execution of the decree for possession, which had been passed against them. In that case their application would come under the rules governing proceedings in execution of a decree. One of those rules is that contained in Art. 179 of the second schedule to the Limitation Act of 1877, which limits the time for applying for execution of a decree to three years from certain dates, one of which is the date on which the last application has been made to the proper Court for execution, or to take some step in aid of execution on the decree. Now, in the present case no application of any kind was made in the matter of the execution of this decree from the time when the applicants made the application for execution on which they were put into possession in August 1873, up to March 1897, a period of much more than three years. Therefore, if the application was properly presented as an application for further execution, it was clearly time-barred when presented and could not be entertained.

We would add that the respondents did not ask to be allowed to have their application converted into a plaint in a redemption of mortgage suit on payment of the court fees payable on a plaint in such a suit.

For the above reasons we allow this appeal, set aside the order of the lower Court, and direct that the respondents' application be dismissed with costs in both Courts.

Appeal decreed.