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in the paragraph of the *Mitakshara* which we have quoted for which a father may dispose of moveable property, and in this view it seems to us that the court below rightly decreed the plaintiff's claim for partition of the moveable property.

We therefore dismiss the appeal with costs.

*Appeal dismissed.*

*Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Banerji.*

GIRDHARI LAL AND ANOTHER (PLAINTIFFS) v. KHUSHALI RAM AND ANOTHER (DEFENDANTS).\*

*Code of Civil Procedure (Act XIV of 1882), sections 244, 583—Decree ex parte—Sale under—Decree set aside—Second decree satisfied—Suit for possession by judgment-debtor not barred.*

K, obtained an *ex parte* decree for sale on a mortgage and in execution thereof caused the mortgaged property to be sold and purchased it himself. The *ex parte* decree was subsequently set aside and another decree was obtained after contest. That decree was satisfied before the property could be sold a second time. As K continued in possession a suit was brought against him to recover possession. *Held* that the suit was not barred by the provisions of section 244 or section 583 of the Code of Civil Procedure 1882.

THE facts of the case are as follows :—

In 1883, the widow and the brother's widow of one Tori Singh, purporting to act for themselves and for Chait Singh, the minor son of Tori Singh, mortgaged the property in suit to Khushali Ram. On the basis of this mortgage Khushali Ram obtained an *ex parte* decree for sale on the 23rd July 1895, and in execution of that decree caused the property to be sold, purchased it himself on the 20th December 1897, and obtained possession. The *ex parte* decree was set aside on the 19th December 1899. On the 10th August 1904, however, after contest another decree for sale was obtained but before the sale was carried out a puisne incumbrancer paid off the amount of the decree. Notwithstanding this, Khushali Ram continued in possession of the property. On the 7th February 1905, the mortgagors sold the property to the plaintiffs Girdhari Lal and Musammatt Lado Bibi. The suit out of which this appeal arose was brought by Girdhari Lal and Lado Bibi as transferees from the mortgagors to recover possession of the property. The court below holding

\* First Appeal No. 283 of 1907, from a decree of Muhammad Shah, Subordinate Judge of Aligarh, dated the 22nd July 1907.

that the suit was barred under the provisions of sections 583 and 244 of the Code of Civil Procedure, (Act XIV of 1882,) dismissed the suit. The plaintiffs appealed to the High Court.

Babu *Jogindra Nath Chaudhri* (with him *Munshi Gulzari Lal*), for the appellants, submitted that section 583 did not apply to the present case. It referred only to a decree passed in appeal. There being no decree passed in appeal in the present case, the section had no application. Section 244 also did not apply. The question involved in the suit was one of restitution and not of execution.

Babu *Durga Charan Banerjee* (with him *Pandit Mohan Lal Sandal*), for the respondents, submitted that section 244 applied to the case and that the plaintiffs had no remedy by a separate suit. The plaintiffs should have applied in execution for the recovery of the property. Not having done so their suit was barred. He relied on *Prosunno Kumar Sanyal v. Kali Das Sanyal* (1).

STANLEY, C. J. and BANERJI, J.—This appeal arises out of a suit for possession of property which had passed into the hands of an auction-purchaser under a sale in execution of an *ex parte* decree which was subsequently set aside. The property in dispute belonged to one *Tori Singh* who left him surviving his widow, his sister-in-law, and a minor son named *Chait Singh*. These relatives were recorded as owners upon his death. In 1883 the widow and sister-in-law purporting to act for themselves, and also as guardian of the minor *Chait Singh*, mortgaged the share in question to the respondent *Khushali Ram*. A suit for sale was brought on this mortgage and on the 23rd of July 1895, an *ex parte* decree for sale was passed and in execution of this decree, the property was sold and purchased by *Khusali Ram* on the 20th of December 1897. *Chait Singh* then applied to have the *ex parte* decree set aside and on the 9th of December 1899, his application was granted and the *ex parte* decree was set aside. In the meantime however *Khusali Ram* had obtained possession of the property as auction-purchaser. On the 10th of August 1904, a second decree for sale was passed but before this sale was carried out a puisne incumbrancer paid off the amount of the decree obtained by *Khushali Ram* and thereby satisfied his

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decree. Khushali Ram on payment of the amount due to him ceased to have any claim or right to the mortgaged property. Notwithstanding, however, that his mortgage was satisfied he remained in possession and the suit out of which the present appeal has been preferred was then brought by the representatives of the mortgagors to recover possession of the mortgaged property. The court below has dismissed the claim on two grounds, the first being that it is barred by section 583 of the Code of Civil Procedure 1882, and the second that it is barred by the provisions of section 244 of the same Code. Section 583 has obviously no application inasmuch as there was no decree by way of restitution or otherwise passed in an appeal. This section only applies to a case where a party is entitled to a benefit by way of restitution or otherwise under a decree passed in an appeal. As there was no decree passed in an appeal the section does not apply.

As regards section 244 it equally seems to us to have no application. So soon as the decree of Khushali Ram was satisfied by payment of his debt by a puisne incumbrancer he ceases to have any interest in the mortgaged property and his decree was satisfied. The question which was raised in this suit was not a question relating to the satisfaction, discharge, or execution of his decree; consequently this section does not bar the suit and the court below was in error in holding that it did.

For these reasons we must allow the appeal. We set aside the decree of the court below and inasmuch as the court below determined the suit upon a preliminary question, and we have overruled its decision upon that question, we remand the suit under the provisions of Order 41, rule 23, to that court, with directions to re-instate it in the file of pending suits under its original number, and dispose of it on the merits.

*Appeal allowed.*