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Vishvanáth Náráyan Mandlik (with him *Ganpatráv Bhás-kar*), for the appellants :—Although the mortgage deeds of the respondents were registered before that of the appellants, the registration only gives them a right to prior satisfaction, which the appellants had offered, and are still willing to give them. Unless they consent, the appellants, as decree-holders, have a claim on the mortgaged land, which the respondents must satisfy.

Pándurang Balibhadra, contra :—The respondents were in possession of the property, and should not have been ousted to make room for the appellants, whose deeds were registered subsequently to their own.

PER CURIAM :—The Court modify the decree of the District Judge, and award possession to the plaintiffs, on condition that they satisfy the claim of the defendants as decree-holders ; or if plaintiffs decline complying with this condition, then defendants to be entitled to possession of the land, on satisfying the amount of the plaintiffs' claim, under their (the plaintiffs') mortgage. The parties to bear each their own costs throughout.

Decree amended.

Special Appeal No. 302 *of* 1864.

Aug. 15.

GIRJOJI BHIKA'JI SONA'R.....*Appellant.*
KESHAVRA'V NA'VJI PA'TI'L HINGE .....*Respondent.*

Mortgagee in Possession—Cultivation—Due Care.

Held that a mortgagee in possession of land was bound to cultivate the best crop which it was ordinarily capable of yielding.

THIS was a special appeal from the decision of F. D. Melvill, Acting Assistant Judge of the Puná District, in Appeal Suit No. 1040 of 1862, reversing the decree of the Munsif of Khed, in Original Suit No. 2795 of 1861.

Keshavráv claimed Rs. 754-5-6, principal and interest due on a mortgage bond, dated Shrávan Sudha the 10th, Shake 1773. Girjoji admitted the bond, but alleged that, the

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plaintiff having forcibly taken possession of five bighás of bágáyat (garden) land of the first class, contrary to the terms of the contract, he, the defendant, had been unable to repay the money with interest, which he had agreed to do from the annual proceeds of the land; that the land had been in the possession of the plaintiff since Shake 1777 (A.D. 1855), while the defendant, Girjoji, paid assessment &c.; that the land was capable of yielding Rs. 125 a year, at which rate, calculating the income, the plaintiff had received Rs. 1,000, in addition to Rs. 50 admitted by him to have been paid, and was, consequently, indebted to him, the defendant.

The Munsif found that the portion of the mortgaged land which the plaintiff had taken into his possession, contrary to the terms of the mortgage bond, must have yielded him during his eight years' possession (from Shake 1777 to 1784), at least Rs. 800; and that his claim was, therefore, satisfied. He, accordingly, decreed in favour of the defendant.

The Assistant Judge, on appeal, laid down the points for decision to be: (1) Was the Munsif right in inquiring, in the way in which he did, as to the average value of the produce; (2) Has the average value of the produce been rightly calculated; (3) Is any, and what, amount due to Keshavráv.

The following is an extract from his judgment:—

"From the accounts shown by the plaintiff, and from the statements made by his two witnesses, it would appear that the land was always sown with bázarí or some such grain; and that the average annual produce realised by him was some eighty or ninety rupees. A commission appointed by the Munsif, to measure and report on the ground, has reported that if cultivated with bázarí, the average amount of the crop would be two or two and a half khandís, the half of which, being the plaintiff's share, would be worth about thirty or forty rupees; but that if cultivated with potatoes, pepper, or such crops, the average annual produce would be worth one or two hundred rupees. I do not know of any law which can compel a mortgagee, when in possession of the

mortgaged land, to cultivate any particular crop. He may cultivate it as he likes, and with as little profit to himself as he likes; and so long as the mortgagor chooses to allow him to retain possession, no objection can be made that he is not doing his best to help the former to pay off the debt.*

"In deciding, therefore, what amount has been realised by the plaintiff, I shall put out of consideration entirely what might have been realised, if a more valuable crop had been cultivated. I do not consider the evidence produced by the plaintiff perfectly satisfactory, and I am, therefore, compelled to decide on the evidence of the witnesses as to the supposed capabilities of the ground. According to that evidence, I consider that the average amount received by the plaintiff could not have been less than one khandí of bázarí or some such grain; and that its value may be calculated at about forty rupees. I, therefore, find, on the second point, that the amount calculated by the Munsif, as realised by the plaintiff, is far too high.

"The plaintiff has held the ground for eight years; and the amount, therefore, that he has realised is Rs. 320. This sum, together with the Rs. 50 specified in the plaint, making in all Rs. 370, must be deducted from the original claim of Rs. 850, leaving a balance due to him of Rs. 480.

* NOTE.—The general rule, no doubt, is that the mortgagee in possession is only accountable for what he receives; and is not bound to take, any particular trouble to make the most of another man's property. But on the other hand, he is bound, as pledgee of the estate, to take the same care of it as every prudent owner is in the habit of taking of his own property; and he is responsible for waste, for the consequence of wilful default, and for all loss resulting from negligence amounting to a breach of trust; though it is true the mortgagor cannot lie by, without giving notice, and afterwards charge the mortgagee with the effect of his own negligence: Add. on Contr., Chap. VIII., 5th Edn.; 2 Wh. & Tu. L. C. Eq. 771, and the cases there cited. The Civil Law is the same, requiring of the creditor "exact diligence" in the custody of the thing pledged; and to be as careful in that custody as the average of careful men usually are in their own affairs: Inst., lib. III., tit. xiv., 4; Dig., lib. XIII., tit. vii., 14. And so by the Hindú Law, as expounded by Sir T. Strange (chap. 12), the creditor in possession of property pledged "will be bound to indemnify his debtor, for any damage it may sustain in his hands through want of due care."—ED.

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"I, therefore, reverse the Munsif's decree, and award Keshavráv Rs. 480 : costs in proportion."

The grounds of objection taken in special appeal were: (1) That the Assistant Judge had not allowed interest on the amount proved by him to have been realised by the plaintiff, although he allowed him interest equal in amount to the principal sum advanced; and (2) that he was in error in holding that a mortgagee in possession was not bound to cultivate garden land with its ordinary crop.

The case was heard before ARNOULD, Acting C.J., and NEWTON, J.

Dhirajlál Mathurádás for the appellant.

Shántárám Náráyaṇ for the respondent.

PER CURIAM :—We hold that Keshavráv, having obtained possession of the land, was bound to cultivate the ordinary crop which it was capable of yielding. We, therefore, reverse the Assistant Judge's decree; and confirm that of the Munsif, with costs.

Appeal allowed.

Oct. 5.

Special Appeal No. 717 *of* 1863.

A'NANDRA'V and DEVRA'V, sons of SADA'SHIV. *Appellants.*
RA'VJI, son of DASHRATH ..... *Respondent.*

Mortgage—Redemption—Directions for an Account.

The rule of Courts of Equity in England as to allowances to a mortgagee in possession not applied; because the mortgagee was led into a belief, by the course of decisions in the late Sadr Adálat, and the general understanding caused by those decisions, that upon the non-payment, by the mortgagor, of the money at the time fixed, he had, according to the terms of the mortgage instrument, become the absolute owner of the property.

Mortgagee allowed benefit for buildings erected, or permanent improvements made, by him upon the mortgaged premises.

THIS was a special appeal against the decision of the Acting Judge of the Konkaṇ, in Appeal Suit No. 488 of 1862, confirming the decree of the Munsif of Alíbág.