

1875.
March 24.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 66 of 1874.

PRABHA'KAR CHINTA'MAN }
DIKSHIT } *Plaintiff and Appellant.*

PA'NDURANG VINA'YAK }
DIKSHIT } *Defendant and Respondent.*

Mortgagee in possession—Account.

A mortgagee in possession is liable to account for profits arising from trees planted by himself on the mortgagor's land.

A mortgagee in *personal* possession is, in the absence of any special contract to the contrary, chargeable, with a fair *occupation rent*, in the case of buildings personally occupied by him for the purpose of residence or carrying on trade or business, and in the case of land personally occupied or cultivated by him, either with a fair *occupation rent* or with the actual net profits realized from the use of the land.

In ascertaining what those profits are, with which the mortgagee ought to be credited in reduction of his mortgage debt with interest thereon, the mortgagee ought to be credited for his expenses in obtaining produce from the land and a moderate interest on the amount of such expenses.

Principles laid down on which an account should be taken from a mortgagee in possession.

THIS was a special appeal from the decision of H. J. Parsons, Assistant Judge at Ratnágiri, amending the decree of the Subordinate Judge of Guhagar.

Prabhákar brought this suit against Pándurang and two others to redeem his share in certain immoveable property, mortgaged by his father for Rs. 121-11-10 in 1835 and 1838. Pándurang, the principal defendant, answered that he had no objection to allow redemption on being paid the amount that might be found due.

The Subordinate Judge, on taking account, found that the net profits of the mortgaged property during the period of the mortgage amounted to Rs. 404-13-8, including profits arising from trees planted by the defendant (mortgagee) after the date of the mortgage. He found that the interest on the mortgage amounted to Rs. 496-14-0 due to the

defendant. The Subordinate Judge, therefore, deducting the amount of profits from the amount of interest, passed a decree in favour of the defendant for Rs. 121-11-10 as principal and Rs. 92-0-4 as interest, total Rs. 213-12-2, on payment of which the plaintiff was to redeem the property from the defendant. In appeal (which was preferred by the defendant), the Assistant Judge reduced the amount of the net profits of the land during the period of the mortgage to Rs. 70-4-1, and held the plaintiff entitled to redeem, on payment to the defendant of Rs. 548-5-9, of which Rs. 426-9-11 was the amount of interest. The Assistant Judge reduced the amount of net profits, because he was of opinion that the mortgagee ought not to be obliged to account for the profits of trees which he himself had planted, after entering into possession of the mortgaged property. He observed :— “Now, I do not at all see why the defendant should be obliged to account for the profits of trees he himself planted. A mortgagee is not bound to improve the land, and, if he does so, his mortgagor gets the benefit of the improvements when he redeems the land. In this case, it is very doubtful, indeed, whether the trees are planted in the share that was mortgaged. What was mortgaged was an undefined share of land, since there has been no division of the field, nor indeed has there been any division of the trees, but at the time of the mortgage, in 1835, the plaintiff's share was only seven trees (as is stated in Exhibit No. 10), and only these seven trees were mortgaged at that time and no more in 1838 by the deed No. 9. There were more trees in the whole field, as the defendant admits, but they did not belong to the plaintiff, as he admits in the deed. Of course, I do not determine at all that in the trees planted subsequently to the mortgage, the plaintiff has no share; what I think and hold is, that the plaintiff cannot call upon the defendant to account for profits of trees that were not mortgaged and were not even in existence at the time of the mortgage, but were planted subsequently to it by the defendant, it may well be in his portion as a co-sharer in the land. The profits must be confined to the profits of what was mortgaged and was in existence at the time of the mortgage.”

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In special appeal, it was principally contended that the account was taken on a wrong basis.

The special appeal was argued before WESTROPP, C.J., and KEMBALL, J.

Rāv Sāheb V. N. Mandlik for the appellant.

Bhairavnāth Mangesh for the respondent.

The Court made the following interlocutory order, remanding the case to the lower court to prepare a fresh account on the principles laid down.

WESTROPP, C.J. :—The Assistant Judge, in taking the accounts with regard to profits arising from trees, has fallen into the error that the plaintiff is entitled to credit for profit arising from such trees only as were standing on the land at the time of the mortgage. There seems to be no good reason for holding that a mortgagee in possession would not be liable to account for profits arising from trees planted by himself on his mortgagor's land, as for profits arising from rice, maize, or other crops sown originally by the mortgagee. There are two modes, in either of which the mortgagee in personal possession would, in the absence of any special contract to the contrary, seem to be chargeable. The first and simpler mode would be that the Court should fix a fair occupation rent for the use and enjoyment of the land or buildings mortgaged. In the case of buildings in the possession of the mortgagee, personally occupied by him for the purpose of residence or carrying on trade or business, a fair occupation-rent would seem to be the only satisfactory mode of charging him. In the case of land personally occupied or cultivated by him, he might be charged either in that way, or with the actual net profits realized by him in using the land. But in order to ascertain what these profits should be, with which the mortgagor ought to be credited in reduction of his mortgage debt and interest thereon, we think that, not only ought the mortgagee to be allowed credit for moneys expended in obtaining produce from the land, such as the cost of seed or young trees, and the fair expenses of cultivation, but also a moderate interest, say

six per cent. per annum, on the capital thus employed ; for it would not be fair that the whole of the profitable results of the employment of that capital should be applied in reduction of the mortgagor's debt. After deducting from the gross produce of the land the Government assessment, or other lawful charges payable in respect thereof, the cost of seed, &c., the proper expense of labour and cultivation and a fair sum for interest on the capital employed in procuring such seed and carrying on such cultivation, the surplus profits ought to be carried to the credit of the mortgagor and in reduction of his debt and interest. We are not, however, to be understood as maintaining that a mortgagee has the right to charge a mortgagor with improvements made without the assent of the latter, or to charge him with interest on capital, where such capital was misapplied by the mortgagee, or not resulting in sufficient produce to cover the interest upon it. No doubt, in the case of land (as well as in that of buildings) in the personal occupation of the mortgagee, it will often be the more simple course for the Court to ascertain what would be a fair occupation-rent, and thus to get rid of the account of the expense and profits of every crop which the mortgagee may bring into existence on the land. Where a mortgagee enters into possession simply by taking the rent from the tenants in actual occupation of the land or buildings, the subject of the mortgage, the account of rents and profits can be easily taken against him. Circumstanced as this particular case is, we think that we must require the Assistant Judge to ascertain and report to this Court what was the net profit made by the defendant on trees planted by himself, on the A'gar land, during the time in which he has been in possession of the plaintiff's undivided one-fourth of that land. In ascertaining this, the Assistant Judge should make allowance to the defendant for the cost of those trees and the expense of the cultivation thereof, and six per cent. per annum as interest on such capital as was engaged by the defendant for these purposes, and should credit one-fourth of the balance of profit to the plaintiff in reduction of the mortgage debt for principal and interest due to the defend-

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ant. It is necessary that this Court should point out that the Assistant Judge has fallen into a fallacy in saying that "it is very doubtful whether the trees are planted in the share that was mortgaged." He had previously found that there had not been any partition of the land, and that the plaintiff's share was, therefore, an undivided share; that being so, the plaintiff could not be said to have a share in any one part of the land more than any other part of it, but he was entitled to an undivided fourth part of it, and is accordingly entitled against his co-parcener and mortgagee, the defendant, who was in possession of the whole, to credit for a fourth of the net profits of the whole. The Assistant Judge is to be at liberty to take such fresh evidence as may seem to him to be desirable and necessary for the purposes of this inquiry. The Court reserves all further directions and costs.

On the 15th January 1875, the following report was made by A. D. Pollen, who in the meantime succeeded H. J. Parsons as Assistant Judge at Ratnágiri:—

"Having made the calculation in the manner indicated by the High Court, I find that the profits amounted to Rs. 229-5-5.

"On the application of the parties, evidence was taken by commission on the spot. The commission, by consent, was issued to the Mahálkari of Guhágar. His very carefully written report is recorded, No. 12, in this inquiry. At first the parties did not produce any evidence before him, and he, therefore, took the evidence of four independent and skilled witnesses. Subsequently other witnesses were examined at the instance of the parties themselves. The result of the inquiry is summed up in the two memoranda, Exhibits 10 and 11.

"The number of trees planted was found to be 58. They must have been all planted about the year 1838. The gross profits arising from the trees between that period and 1870 has been estimated at Rs. 1,817-8-0, of which sum, Rs. 257-8-0 were referred to miscellaneous income, such as leaves, fire-wood, &c., and Rs. 1,507 to the actual value of the fruit.

The calculation was made after personal inspection, and separate estimate of each individual tree and its correctness has been admitted before me by the pleaders on each side.

“In estimating the expenses, the Commissioner has discriminated between the expenses incurred in cultivating the trees up to the time when they commenced to bear, and the expenses since they began to yield fruit. He considered that interest was to be calculated on the former kind of expenses only, and not on the latter. This appears to me to be an error into which he was led by the Maráthi translation of the expression, ‘expenses of cultivation,’ which I take to mean the ordinary expenses which must be incurred each year to keep the trees in a proper condition.

“The trees were not capable of producing fruit for ten years after being planted. The preliminary expenditure during that period may be taken as amounting to Rs. 166-14-0.

“This sum includes the original price of the plants, of planting and digging, of hedging and fencing, of a bullock for watering, bullock’s food, kit, and labour.

“I consider this estimate very correct and fair. The parties of course argue that the items should be slightly varied one way or the other, to suit their own interests, but, on the whole, they have no valid objection to offer. Interest on the capital so expended from year to year amounts, at six per cent., to Rs. 314-5-2, so that the capital expended on the trees for the first ten years and the interest on the same together amount to Rs. 481-3-2.

“After the trees began to bear, they required to be watered and, as a matter of fact, were watered for fifteen years. The expenses for this time, including bullocks, kit, food, and servant, could not have been less than Rs. 204, the details of which for the fifteen years are as follows:—Two bullocks Rs. 24; leather kit for ditto Rs. 45; food for ditto Rs. 75; servant Rs. 60. The full details of each separate year’s expenses are shown in Exhibit 11. The Commissioner did not calculate any interest on this sum, but the order of the High Court requires this to be done. I find that the total

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 Maráthi *yád* annexed, marked Z).

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“Principal and interest together come to Rs. 418-15-0, which added to the principal and interest on the first ten years’ expenditure, being the total expenditure (with interest) of the first twenty five years, to Rs. 900-2-2.

“No water has been supplied to the trees for the last ten years or so, and there has, therefore, been no expenditure of capital on them in that period. I have only, therefore, to deduct Rs. 900-2-2 from the gross profits to get the net profit. The result is Rs. 917-5-10, of which the plaintiff’s fourth share would be Rs. 229-5-5.

“I, therefore, find on the point referred to me that the net profit was Rs. 229-5-5.”

On the receipt of the above report, the case came on for final disposal before the same bench on the 24th March 1875, when the plaintiff was declared entitled to redeem and recover possession of his share in the property on payment by him to the defendant of Rs. 368-8-4 instead of the sum of Rs. 548-5-9, first awarded by the lower court.

Decree amended.

[APPELLATE CIVIL JURISDICTION.]

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Regular Appeal No. 54 of 1873.

HIMMATSING BECHAR- SING.....	} Appellant (Original Defen- dant).
GANPATSING, styling himself the son of HIMMATSING.....	
	} Respondent (Original Plain- tiff).

Hindu Law—Maintenance.

A suit for maintenance out of ancestral estate by a Hindu son lies against his father where the property in the hands of the latter is impartible.

Quere :—Whether a like suit lies where the son might sue for partition.

THIS was an appeal from the decision of W. H. Newnham, Judge of the District of Ahmedabad.