

Judge held that a further fee of Rs. 45 was leviable in respect of the annual payment claimed. The plaintiff refused to pay the aggregate fee, or to amend the plaint by restricting his claim to that for possession of the land.

We think that the Subordinate Judge erred in applying s. 17 of the Court Fees' Act, 1870. to the case. The principle on which the fee was leviable is that stated in *Motigauri v. Pranjivandas* (1). The claim having been in the alternative, the larger of the two reliefs sought ought to have determined the amount of the stamp. On his memorandum of appeal in this Court, the plaintiff has paid a stamp of the value of Rs. 45, which is the appropriate stamp for the larger of the two reliefs here prayed for, and he is willing to make up the stamp to Rs. 45 on his plaint. The case is one with which we can deal in appeal, notwithstanding s. 12 of the Court Fees' Act, on the principles laid down in the Full Bench case of *Vithal Krishna v. Balkrishna Janardan* (2), because the valuation settled by the Subordinate Judge was not one within his proper function, inasmuch as the case did not fall under the section of the Act relied on by him. He treated the case as if it were one of cumulative reliefs sought by the plaintiff, to which alone s. 17 is applicable; whereas a single cause of action only is alleged in the plaint.

[84] We reverse the decrees of the Courts below, and direct that, on the plaintiff making up the deficient stamp on the plaint, the suit be proceeded with according to law. Costs to be costs in the cause.

Decree reversed.

15 B. 84.

APPELLATE CIVIL.

Before Mr. Justice Bayley and Mr. Justice Parsons.

BALKRISHNA BABAJI (*Original Plaintiff*) Appellant v. HARI GOVIND
(*Original Defendant*), Respondent.* [12th August, 1890.]

Interest—Rule of damdupat—Its application to mortgages where no account of rent and profits is to be taken—Mortgage.

The rule of *damdupat* applies to mortgages where no account of the rents and profits has to be taken.

SECOND appeal from the decision of Mr. H. Scott, District Judge of Satara, in appeal No. 123 of 1888 of the District File.

The plaintiff sued as purchaser of the equity of redemption, to redeem certain property which had been mortgaged with possession under two bonds. One bond was passed in A.D. 1835 for Rs. 350, and provided that the whole of the rents and profits of the property mortgaged should be taken in lieu of interest. The other bond was passed in A.D. 1838 for Rs. 25, for which interest was to be paid at 12 per cent. for the first six months and then at 24 per cent. *per annum*.

The Subordinate Judge held that the mortgagee was not entitled to claim interest exceeding the principal under the second mortgage. He

* Second Appeal, No. 697 of 1889.

(1) 6 B. 302.

(2) 10 B. 610.

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15 B. 84.

found, on taking accounts, that a sum of Rs. 619-11-11 was due to the mortgagee, and decreed redemption on payment of this amount within six months.

On appeal, the District Judge held, on the authority of *Narayan v. Gangaram* (1), that the rule of *damdupat* did not apply to mortgages. He amended the decree of the Subordinate Judge by directing that the plaintiff should pay Rs. 798-0-1 within six months and redeem the property, or be for ever foreclosed.

[85] Against this decision the plaintiff appealed to the High Court.
Mahadev Chimnaji Apte, for appellant.
Ramchandra Ganesh Mundle, for respondent.

JUDGMENT.

BAYLEY, J.—The District Judge is wrong in saying that the rule of *damdupat* does not apply to mortgages. The decision he quotes, *Narayan v. Gangaram* (1), is, no doubt, to that effect; but the proposition has there been laid down too broadly, as is shown in later cases. See *Nathubhai Panachand v. Mulchand Hirachand* (2); *Narayan v. Satvaji* (3); *Ganpat Pandurang v. Adarji Dadabhai* (4). The rule does apply to mortgages where no account of the rents and profits has to be taken, as is the case here (5).

We, therefore, amend the appellate Court's decree by substituting Rs. 680-13 5 for Rs. 798-0-1, and by directing that, on payment within six months of this date of that sum plus or minus, as the case may be, any sum that may be found due to either party in execution on taking accounts under the first mortgage from the 17th April, 1889 to date of payment, and of the costs of the defendant that he has been ordered to pay, plaintiff redeem, and that, in default of such payment, he be for ever foreclosed.

Each party to bear his own costs in this and the lower appellate Court.

Decree amended.

15 B. 86.

[86] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Telang.

BAIKALI (*Plaintiff*) v. ALARAKH PIRBHAI, (*Defendant*).*
[14th August, 1890.]

Civil Procedure Code (Act XIV of 1882), s. 159—Summonses to witnesses—Limitation—Practice—Construction.

Under s. 159 of the Civil Procedure Code (Act XIV of 1882), a party to a suit is entitled, as of right, to obtain summonses for his witnesses any time before the day fixed for the disposal of the suit.

[F., 13 C.P.L.R. 152; Appl., 16 A. 218 (219).]

* Civil Reference, No. 2 of 1890.

(1) 5 B. H. C. R. A. C. J. 157.

(2) 5 B. H. C. R. A. C. J. 196.

(3) 9 B. H. C. R. A. C. J. 83.

(4) 3 B. 312 (333).

(5) W. & B. 786, 3rd ed.