

JUDGMENT.

SARGENT, C.J.—The lower appeal Court has held that the plaint was barred because the co-sharers in the rent were not made parties until they were made so by its decree on the 3rd July, 1890. But we think that, as the co-sharers made their application during the hearing of the suit, as far back as 24th January, 1889, to be allowed to adopt what the plaintiff had done, and to be made co-plaintiffs, its order allowing the application, which had been refused by the Court of first instance, should be treated as operating *nunc pro tunc*, and that the other sharers should be regarded as having been made parties to the suit when that application was made. The delay between 24th January, 1889, when the application was made, and the decision of the Court of appeal, was attributable to the act of the Court, and the appellants should, therefore, not suffer from it (Broom's Legal Maxims, 6th ed., page 117).

We must, therefore, reverse the decree and send back the case for a fresh decision, having regard to the above remarks. Costs to abide the result.

Decree reversed.

17 B. 32.

APPELLATE CIVIL.

*Before Sir Charles Sargent, Kt., Chief Justice, and
Mr. Justice Birdwood.*

SIDU (*Plaintiff*) v. BALI AND OTHERS (*Defendants*).*
[12th January, 1892.]

Mortgage—Redemption suit—Costs due by mortgagee to mortgagor—Set off against the mortgage debt—Balance remaining due to mortgagor—Liability of mortgagee—Civil Procedure Code (Act XIV of 1882), s. 221.

The mortgagor is entitled to set off or deduct the amount of costs payable to him under the decree against or from the mortgage debt payable by him. If the amount of the costs be larger than the mortgage debt, the mortgagor is entitled to obtain possession at once, of mortgaged property and to recover the balance against the mortgagee.

[R., 16 C.P.L.R. 73 (74).]

[33] THIS was a reference made by Rao Saheb Anant Gopal Bhawe, Subordinate Judge of Khatav in the Satara District, under s. 617 of the Civil Procedure Code (Act XIV of 1882).

The facts which gave rise to the reference were as follows:—

The plaintiff, Sidu, having obtained a decree for redemption of certain immovable property on payment of Rs. 20 to the defendant Bali within six months, paid the said amount into Court within the appointed time, and recovered possession of the property through Court. Before the amount was paid to the defendant, the original decree was reversed by the Special Judge, and consequently on the application of the defendant the property was delivered back into his possession, and the redemption money paid by the plaintiff into Court was returned to him. Subsequently the High Court, reversing the decree of the Special Judge, restored that of the Court of first instance, and ordered the defendant to pay costs

* Civil Reference No. 15 of 1891.

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throughout. After six months from the date of the decree of the High Court had expired, the plaintiff made an application for execution of the decree, in which he sought to set off the amount of redemption money due from him against the amount of costs which were payable to him by the defendant, and to recover the balance by attachment of the moveable property of the defendant, and also to recover possession of the mortgaged property.

The Subordinate Judge entertained doubt on the following questions, which he submitted for consideration :—

“(1) Whether the amount of redemption money payable under the decree by the plaintiff to the defendant can be set off against the amount of costs awarded to the former against the latter ?

“(2) Whether the plaintiff's right of redemption was foreclosed by reason of his having failed either to pay into Court the amount of redemption money, or to obtain an order for setting off the said sum against the amount of costs due to him from the defendant, and for compelling him to enter satisfaction upon the decree within the aforesaid period of six months ?

[34] “(3) If the plaintiff's right to redeem is found to be foreclosed, can he still enforce the order of costs against the defendant ; or in other words, will it survive ?”

The Subordinate Judge's opinion on the first two points was in the affirmative, and he expressed no opinion on the third.

Further on in the reference the following question was framed for submission :—

“Whether it was not necessary for the plaintiff to apply to the Court, within the period of six months granted to him by the decree for payment of the mortgage amount, for an order allowing the set-off and declaring him to be entitled to recover possession of the mortgaged property from the defendant at any time of course within the prescribed period of limitation ?

On the above question the opinion of the Subordinate Judge was in the affirmative.

There was no appearance for the parties in the High Court.

JUDGMENT.

SARGENT, C.J.—We think that s. 221 of the Civil Procedure Code (XIV of 1882) is applicable to a case of this description, and we agree with the decision of the Calcutta High Court in *Brijnath Dass v. Juggernath Dass* (1), that the mortgagor is entitled to set off or deduct the amount of the costs payable to him under the decree against or from the mortgage debt payable by him. If that be so, and if the costs, as in this case, are of larger amount than the mortgage debt, the mortgagor is entitled to obtain possession at once of the mortgage property and to recover the balance of the costs against the defendant.

Order accordingly.