

## APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

RUKHMINIBAI *alias* LAKSHMIBAI KOM SUBRAYA PAI AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, v. VENKATESH BAB PRABHU (ORIGINAL DEFENDANT), RESPONDENT.\*

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June 19.

*Civil Procedure Code (Act XIV of 1882), sections 13, 43—Res judicata—Usufructuary mortgage—Suit for possession of mortgaged property—Tender of mortgage money—Deposit in Court—Redemption decree—Second suit to recover mesne profits from the date of deposit to the date of recovery of possession of mortgaged property—Transfer of Property Act (IV of 1882), sections 62, 83—Position of mortgagee in possession after the tender or deposit of mortgage money.*

In 1884 the plaintiffs executed a usufructuary mortgage in favour of the defendant and placed him in possession of the property. In 1901, the plaintiffs tendered the amount of the principal to the defendant, but it was not accepted. The plaintiffs in consequence filed a suit, under section 62 of the Transfer of Property Act (IV of 1882), to recover possession of the mortgaged property, and at the same time under section 83 of the Act deposited the amount of the principal in Court as the amount payable on the mortgage. The Court passed a decree for possession.

In 1904 the plaintiffs filed another suit to recover mesne profits from the defendant from the date of the deposit to the date when he recovered possession of the mortgaged property from the defendant in execution of the redemption decree in the previous suit. The claim was disallowed on the ground of *res judicata*.

*Held*, that the plaintiffs having failed to ask for mesne profits in the previous suit, his present claim was barred either under section 13 or 43 of the Civil Procedure Code (Act XIV of 1882).

The profits derived by a mortgagee after a proper tender made or after the amount due has been deposited in Court are profits for which he has to account to the mortgagor in virtue of a liability tacked on, so to say, by the statute to the mortgage contract; and as such a claim to them by the mortgagor is one arising from and connected with his right to redeem or recover possession of the property.

From the date of the tender or of the deposit, as the case may be, the mortgage continues as mortgagee but with a statutory liability to account for the profits received by him from that date. He is not then a mere trespasser but a mortgagee still, holding the property as a kind of trustee for the mortgagor and as such accountable to the latter for the profits.

\* First appeal No. 78 of 1906.

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SECOND Appeal from the decision of G. D. Madgavkar, District Judge of Kanara, reversing the decree passed by E. F. Rego, Subordinate Judge of Honawar.

Suit to recover a sum of money as mesne profits of certain lands.

The lands belonged originally to one Krishnadas, who mortgaged them with possession to defendant in 1884. After Krishnadas' death, his widow Bayama sold her equity of redemption to plaintiff No. 1, who sold two-thirds to plaintiffs Nos. 2 and 3. The mortgage was usufructuary.

The three plaintiffs offered the mortgage money to defendant in 1901. The money was not accepted. The plaintiffs produced the money in Court on the 24th June 1901, under section 83 of the Transfer of Property Act (IV of 1882), and applied to redeem. The money was not accepted by defendant.

The plaintiffs then filed suit No. 338 of 1901 to recover possession of the lands by redeeming the mortgage. The suit was decreed with costs on the 27th May 1903. On the 15th July 1903, the plaintiffs got possession of the property.

On the 24th June 1904 the plaintiffs filed the present suit to recover mesne profits of the lands from the defendant which had accrued from the 24th June 1901 (the day on which the money was deposited) to the 15th July 1903 (the date on which possession was obtained).

The defendant contended *inter alia* that the suit was barred by *res judicata*.

The Subordinate Judge decreed the plaintiffs' claim, holding that it was not barred by *res judicata*.

On appeal the District Judge came to a contrary conclusion. He reversed the decree and dismissed the suit. His reasons were as follows:—

From the judgment, exhibit 14, and the decree, exhibit 13, in suit No. 338 of 1901, it appears that the plaintiff then, as now, claimed future mesne profits with this difference, that he did not, even then, claim mesne profits from 24th June 1901, when he deposited the mortgage amount in Court but merely 'mesne profits,' the exact words in exhibit 13 being 'the produce of the land'

and in exhibit 14, 'future mesne profits.' No copy of the plaint has been filed and the exact language and date of the plaint cannot, therefore, be ascertained. But the words 'future' in exhibit 14 may be taken to show that the plaintiff did not claim past mesne profits from 24th June 1901, to the date of institution of suit No. 338 of 1901. If so, that portion of the present claim is clearly barred under section 13, explanation II, the latitude allowed, if any, being only in respect of future mesne profits.

The second portion of the present claim, namely, the mesne profits from the date of institution of suit No. 338 of 1901 up to 15th July 1903, the date of possession, must be distinguished from the first. The plaintiff claimed them in the plaint in that suit as a relief along with redemption, not indeed expressly, but in the words 'future mesne profits.' But no express issue on the point was asked for or framed; and the judgment, exhibit 14, and the decree, exhibit 13, are both silent on the point. Nor did the plaintiff press the matter either in revision or appeal nor yet in execution of the decree exhibit 13. Under these circumstances, even though the duty of raising issues rests with the Court, *Ganu v. Shri Dev Sidheshwar*, I. L. R. 26 Bom. 381, this relief, claimed in the plaint, which is not expressly granted by the decree, must be deemed to have been refused, for the purpose of section 13, explanation III, of the Civil Procedure Code. There is no suggestion in the judgment, exhibit 14, referring the plaintiff to execution proceedings or another suit in respect of these mesne profits, expressly claimed. That suit, in which the defendants delay in accepting the amount deposited in Court under section 83, Transfer of Property Act, was gone into, was undoubtedly the proper time and place to decide whether the delay was legal and equitable and the mesne profits to be allowed to one side or the interest to the other. Apart from the materials and findings in that suit, there are no others here to enable the Court to fix the responsibility for this delay. The matter was substantially and directly in issue in that suit between the parties, even though no express issue was framed. The claim was set up by plaintiff and denied by the defendant; it was not expressly granted and must be deemed to have been refused. The authorities cited in *Kachu v. Gulabsing*, I. L. R. 25 Bom. 115, seem to favour this view, though that case was in reference to past and not to future mesne profits. But the future mesne profits claimed in this suit are not incidental profits, so to say, such as the profits between the institution of suits and the date of possession, as in *Ram Dayal v. Madan Mohan Lal*, I. L. R. 21 All. 425, or in *Mon Mohun Sirkar v. The Secretary of State for India*, I. L. R. 17 Cal. 969, but profits anterior to the date of institution, and anterior to the decree which is dated 27th May 1903. The award or refusal of these essential profits depended upon the satisfactoriness or otherwise of the defendant's refusal to accept the amount deposited in Court and give up the mortgage-deeds—all points considered and decided in the former suit, which cannot now be re-opened. The plaintiff's proper remedy, if he thought the refusal by the Court an accidental and not a deliberate omission, was to apply by way of review or

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appeal or at least in execution. Failing this his present claim is barred under section 13 of the Civil Procedure Code.

The plaintiff appealed to the High Court.

*Nilkanth Atmaram* for the appellants:—We submit the suit is not barred by *res judicata*. The mesne profits were claimed in the first suit, but no order was passed as to them. See *Hays v. Padmanand Singh*<sup>(1)</sup>, *Mor Mohun Sirkar v. The Secretary of State for India in Council*<sup>(2)</sup>, *Ram Dayal v. Madan Mohan Lal*<sup>(3)</sup>, *Bhivra v. Sitaram*<sup>(4)</sup>, *Ramabhadra v. Jagannatha*<sup>(5)</sup>.

The decree passed in the first suit does not present any bar to the second suit. The first suit was brought under the provisions of section 62 of the Transfer of Property Act (IV of 1882), and it ended in a decree awarding possession. The mortgage money having been deposited in Court, the suit was one in ejectment and not for possession. See *Yates v. Hambly*<sup>(6)</sup>, *Walters v. Webb*<sup>(7)</sup>, and *Zubeda Bibi v. Sheo Charan*<sup>(8)</sup>. Under section 62, the mortgagor by depositing the money in Court, becomes absolutely entitled to recover possession of the mortgaged property. The section provides a summary remedy to the mortgagor to recover possession of the property, the nature of such suit being in ejectment.

*Sunitra A. Hattiangadi* for the respondent:—The first suit was a redemption suit and the decree a decree for redemption. The plaintiffs should have included in it the prayer for mesne profits of the mortgaged property. The liability to account for the gross receipts from the mortgaged property is a liability arising out of the relation of mortgagor and mortgagee. See Transfer of Property Act (IV of 1882), section 76, clause (i). The claim as to mesne profits not having been advanced in the first suit, is now *res judicata*. See *Satyabdi Behara v. Harabati*<sup>(9)</sup>, *Vinayak v. Dattatraya*<sup>(10)</sup> and *Kachu v. Lakshmansing*<sup>(11)</sup>.

(1) (1903) 32 Cal. 118.

(2) (1890) 17 Cal. 968.

(3) (1899) 21 All. 425.

(4) (1894) 19 Bom. 532.

(5) (1890) 14 Mad. 328.

(6) (1742) 2 Atk. 360 at p. 362.

(7) (1870) L. R. 5 Ch. App. 533.

(8) (1899) 22 All. 83 at p. 85.

(9) (1907) 34 Cal. 223.

(10) (1902) 26 Bom. 261.

(11) (1900) 25 Bom. 115.

The last cited case refers no doubt to past profits, but its principle applies here.

It cannot be said that after the tender and deposit of the mortgage money by the mortgagor, the mortgagee was a mere trespasser. The mortgage subsists though the mortgagee may not thereafter be entitled to interest and on the other hand be liable to account for his receipts from the property. See *Bank of New South Wales v. O'Connor*<sup>(1)</sup>, and Transfer of Property Act (IV of 1882), section 83.

*Nilkanth Atmaram* was heard in reply.

CHANDAVARKAR, J.:—The question of law in this case is whether the present suit is barred under section 13 of the Civil Procedure Code. The facts material for the point may be stated thus. The appellant mortgaged his property to the respondent in 1884 on the terms that the mortgagor should redeem it on payment of the principal and that the mortgagee should be in possession and enjoy the profits in lieu of interest. It was, in short, a usufructuary mortgage. It is common ground that the respondent as mortgagee went into possession under these terms. In 1901 the appellant tendered the amount of the principal to the respondent but it was not accepted. The appellant in consequence filed a suit under section 62 of the Transfer of Property Act to recover possession of the mortgaged property, and at the same time under section 83 of the Act deposited the amount of the principal in Court as the amount payable on the mortgage. The Court passed a decree for possession as claimed by the appellant. The suit, which has led to this second appeal, was brought by him to recover mesne profits from the respondent from the date of the deposit to the date when he recovered possession of the mortgaged property from the respondent in execution of the redemption decree in the previous suit. The lower Court has disallowed the claim for mesne profits on the ground of *res judicata*.

The question in this second appeal is whether that is right. Its determination depends upon the nature of the legal relation

(1) (1889) 14 App. Cas. 273.

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in which the parties stood to each other during the period to which the mesne profits claimed by the appellant relate. In other words, the question is, did the respondent continue in possession of the property after the date of the deposit as a mortgagee, with a liability to restore the property to the appellant and account for the profits arising in consequence of his refusal to accept a tender properly made by the appellant, or did he from that date cease to be a mortgagee and become a trespasser pure and simple liable to be ejected as holding the property wrongfully?

The answer to this question is supplied by the material provisions of the Transfer of Property Act. By section 58 of that Act the terms mortgagor and mortgagee are defined.

A mortgage means "the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced." The transferor is called a mortgagor; the transferee a mortgagee. Where the mortgage is usufructuary, the mortgagee enters into possession under his contract and it is undisputed that till a proper and legal tender of the amount due on the mortgage is made he holds possession in that character. Does he lose that character and become a trespasser if and when the tender is refused? According to section 60 of the Transfer of Property Act, after such tender the mortgagor has a right to require "the mortgagee" to deliver possession of the property to him; and such right, according to clause 3 of the section, "is called a right to redeem." If that is the legal nature of the right, the mortgagee, though holding possession contrary to the terms of the mortgage, continues as *mortgagee*. And section 62, clause (b) provides that "in the case of a usufructuary mortgage the mortgagor has a right to recover possession of the property" "where the mortgagee is authorised to pay himself from such rents and profits the interest of the principal money,—when the term (if any) prescribed for the payment of the mortgage money has expired and the mortgagor pays or tenders to the mortgagee the principal money, or deposits it in Court as hereinafter provided".

It is significant that in none of these sections does the Legislature say that when a proper tender has been made and refused

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or the amount properly tendered deposited in Court, the mortgagee ceases to have that character or that his interest in the property as transferee defined by section 58 is extinguished so as to make him a mere trespasser. That the said interest still continues is made more explicit in clause (i) of section 76, which provides that "when the mortgagor tenders, or deposits in manner hereinafter provided, the amount for the time being due on the mortgage, the mortgagee must, notwithstanding the provisions in the other clauses of this section, account for his gross receipts from the mortgaged property from the date of the tender or from the earliest time when he could take such amount out of Court, as the case may be."

That is, from the date of the tender or of the deposit, as the case may be, the mortgagee continues as mortgagee but with a statutory liability to account for the profits received by him from that date. He is not then a mere trespasser but a mortgagee still, holding the property as a kind of trustee for the mortgagor and as such accountable to the latter for the profits. Such is the character, according to the Act, of the mortgagee's possession after he has rejected a legal tender and the Act in that respect follows the rule of English law, stated by Mr. Ashburner at page 258 of his "Principles of Equity" that "a mortgagee only becomes a trustee for the mortgagor after he has been paid." The same rule is stated in other words by Mr. Ashburner as follows in his Treatise on Mortgages:—"In the case of a mortgage, whether of land or chattels, a tender properly made and improperly rejected, neither extinguishes the mortgage debt nor determines the mortgagee's property in the security. *Bank of New South Wales v. O'Connor* (1); *Johnson v. Diprose*." (2)

If that is the law, the profits derived by the mortgagee after a proper tender made or after the amount due has been deposited in Court, are profits for which he has to account to the mortgagor in virtue of a liability tacked on, so to say, by the statute to the mortgage contract, and as such a claim to them by the mortgagor is one arising from and connected with his right to

(1) (1889) 14 App. Cas. 273.

(2) [1893] 1 Q. B. 512 at p. 517.

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redeem or recover possession of the property. It is all one cause of action which might and ought to be alleged by the mortgagor in his suit to recover possession. (Explan. II to section 13 of the Code of Civil Procedure). The appellant having failed to ask for mesne profits in the previous suit, his present claim is barred either under that section or under section 43 of the same Code.

The decree is confirmed with costs.

*Decree confirmed.*

R. R.

## APPELLATE CIVIL.

*Before Mr. Justice Russell, Acting Chief Justice, and Mr. Justice Batty.*

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July 16.

THE AGENT, G. I. P. RAILWAY COMPANY, BOMBAY, (ORIGINAL DEFENDANT), APPLICANT, *v.* DEWASI VERSEE AND OTHERS (ORIGINAL PLAINTIFFS); OPONENTS.\*

*Indian Railways Act (IX of 1890), sections 77 and 140—Refund of an overcharge—Notice—Letter—Manner of service—Statement of fact not a proof of fact.*

Plaintiffs, who were merchants residing at Poona, entered into an agreement with the G. I. P. Railway Company that the latter should deliver consignments of goods despatched from Wadi at Poona at a certain rate. Several consignments were accordingly delivered by the Railway Company at Poona and they were paid for according to the agreed rate. At the time of the delivery of the last consignment, the Railway Company refused to deliver it unless all the consignments, including those already delivered and paid for, were paid for at a higher rate. The plaintiffs thereupon paid the higher rate under protest and sued the Railway Company in the Court of Small Causes at Poona for the recovery of the overcharges claimed and received by the defendant. The defendant contended that the suit was not maintainable inasmuch as no notice of the claim was served by the plaintiffs according to section 77 of the Indian Railways Act (IX of 1890). The Judge over-ruled the defendant's contention and allowed the claim holding that a notice under section 77 of the Act was not necessary because the section contemplated overcharges recovered before the delivery of the goods to the consignee and not to overcharges recovered after the delivery as was the present case. He further held that if notice was necessary, it was

\* Application No. 333 of 1906 under the extraordinary jurisdiction.