

## APPELLATE CIVIL

Before Mr. M. C. Chagla, Chief Justice

1952  
Nov. 28  
VITHOBA NILO NAIK (ORIGINAL DEFENDANT), PETITIONER v. BHA-  
GIRATHI BABU RANE AND ANOTHER (ORIGINAL PLAINTIFFS),  
OPPONENTS.\*

*Bombay Agricultural Debtors Relief Act (Bom. XXVIII. of 1947), s 32*  
—Application by possessory mortgagee for adjustment of mortgage  
debt—Award adjusting debt up to date of application and giving  
possession of mortgaged property to mortgagor—Mortgagor already  
in possession of property as tenant of mortgagee—Mortgagor's  
possession as tenant continuing from date of application to date of  
award—Suit by mortgagee for recovery of rent accruing between  
two dates—Maintainability of suit under general law.

The Bombay Agricultural Debtors Relief Act, 1947, makes no provision for the liability of an usufructuary mortgagee to account for the income or profits that he may derive from the mortgaged property of which he is in possession. Therefore, if an award adjusting the mortgage debt under the Act does not provide for the period during which the mortgagee is in possession and does not refer to his liability to account or to give credit to the mortgagor for the profits or income made out of the property, then that question must be determined by the general law rather than by the Bombay Agricultural Debtors Relief Act. In this matter there is no difference in principle between the case where the mortgagee has let the property to the mortgagor and the case where the mortgagee himself remains in possession; nor where the mortgagee lets the property to a stranger.

A possessory mortgagee, who had let the mortgaged property to the mortgagor, filed an application under the Bombay Agricultural Debtors Relief Act, 1947, for adjustment of the mortgage debt. Mortgage accounts were taken up to the date of the application and an award was passed in favour of the mortgagee for the amount found due under the mortgage. The award also gave possession of the mortgaged property to the mortgagor. Subsequently the mortgagee filed a regular suit against the mortgagor for recovery of rent due in respect of the mortgaged property for the period between the making of the application and the passing of the award. The mortgagor contended that the mortgage debt having been adjusted the rights of the parties were merged in the award and the mortgagee was therefore not entitled to recover any rent:

*Held*, rejecting the contention that as the award gave possession to the mortgagor only on the date of the award and there was nothing in law which made the possession of the mortgagee unlawful between the date of the application and the date of the award and as the accounts had been settled only up to the date of the application and as the mortgaged property was let by the mortgagee to the mortgagor, the mortgagee was entitled to recover rent from the mortgagor.

\* Civil Revision Application No. 157 of 1952.

CIVIL REVISION APPLICATION from the decision of S. G. J. D'Costa, Esquire, Civil Judge, Senior Division, at Karwar.

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On May 13, 1942, Vithoba (defendant) mortgaged with possession a piece of land situate at Wailwada in Karwar district for Rs. 500 to plaintiffs. Possession of the land having been given to the plaintiffs, they executed a lease in favour of the defendant who continued in possession as a tenant of the mortgagees.

On July 31, 1947, the plaintiffs applied under the Bombay Agricultural Debtors Relief Act, 1947, for adjustment of the mortgage debt. Mortgage accounts were taken up to the date of the application and an award for Rs. 415 was passed on January 31, 1951, in favour of the plaintiffs. Under the award the defendant was given possession of the mortgaged property.

On April 16, 1951, the plaintiffs filed the present suit against the defendant for recovering the rent of the mortgaged property for the period between the date of the application for adjustment of debts and the date of the award in the Court of the Civil Judge, Senior Division at Karwar. The learned Judge decreed the suit on September 29, 1951.

The defendant applied to the High Court in revision.

*G. N. Vaidya*, for the Petitioner.

*M. A. Rane*, for the Opponent.

CHAGLA C. J. A very interesting question under the B. A. D. R. Act arises on this revision application. The opponents applied under the B. A. D. R. Act to have the debt of the petitioner adjusted. The debt was a mortgage debt. The B. A. D. R. Act Court took accounts and adjusted the debt at Rs. 415 and the Court ultimately passed an award on January 31, 1951. Under the award the petitioner was given possession of the mortgaged property. On April 16, 1951, the opponents filed a suit against the petitioner for recovering the rent of the mortgaged property. The suit came to be filed under the following circumstances. The mortgage which the petitioner had executed in favour of the opponents was a possessory mortgage. Possession having been given to the opponents, they as mortgagees executed a lease in favour of the petitioner and the petitioner was in possession of the property as a tenant of the opponents. Therefore the suit filed by the opponents was a suit as landlords against their tenant and the Small Causes Court Judge below passed a decree in favour of the opponents, and the contention of Mr. Vaidya is

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that the mortgage debt having been adjusted under the B. A. D. R. Act the rights of the parties are merged in the award and the opponents are not entitled to recover any rent in respect of the mortgaged property.

Turning to the B. A. D. R. Act, the scheme of the Act is to adjust debts of a debtor up to the date of the application, and it is common ground that in this case the mortgage accounts were taken up to July 31, 1947, and the mortgage debt was adjusted as of that date. Therefore the B. A. D. R. Act Court found that the mortgage debt which the petitioner was liable to discharge was Rs. 415. That amount was made payable by the petitioner under the award by instalments. But the difficulty that arises in this case is, what is the position of the mortgagees between July 31, 1947, and January 31, 1951, when the award was passed. Now, there is an obvious lacuna in the B. A. D. R. Act because the Act does not make any provision for the rights of the mortgagor or the mortgagee between the date up to which the mortgage debt is adjusted and the date of the making of the award. It is important to note that when the award is passed, the secured debt which is scaled down according to the provisions of the Act is charged on the property on which it was originally secured. Therefore the effect of the award would be that the sum found to be due by the petitioner to the opponents under the mortgage would be charged on the mortgaged property. Therefore it is clear that after the date of the award the mortgaged property will no longer be subject to mortgage but will only be subject to the statutory charge mentioned in s. 32. Mr. Vaidya says that the scheme of the Act is to adjust all debts which were due by the debtor at the date of the application completely and effectively and the effect of the award is that the debt becomes merged in the award and Mr. Vaidya says that the mortgage became merged in the award and in effect his argument is that the award must be given a retrospective effect so that it becomes operative from July 31, 1947. Therefore according to him, as soon as the debt was scaled down as of July 31, 1947, and it was adjusted as of that date, the mortgage ceased to exist and the mortgagee had had no rights as a mortgagee. Now, there are several difficulties in accepting this position. As I have just pointed out, it is only when the award is passed that the debt becomes charged on the mortgaged property. If Mr. Vaidya's contention were sound, then the position would be that between the date when the debt is adjusted and the award is passed the mortgaged property would not

be a security at all for the debt of the creditor. In other words, during this intervening period the property would be unencumbered. It is impossible to accept that position to be correct. The other difficulty is that if Mr. Vaidya were right, then the possession of the mortgagee between the date up to which the accounts were taken and the date of the award would become wrongful. If the mortgage ceased to exist on July 31, 1947, then the possession of the mortgagee from July 31, 1947, to January 31, 1951, would be a possession which could not be justified in law. That again is a position which cannot be accepted because under the B. A. D. R. Act it is under s. 32 (5) that the Court passes an order for the delivery of the possession of the property and that order forms part of the award. Therefore the mortgagee having rightfully come into possession as a mortgagee, his possession obviously continues lawful till the award is passed which is on the 31st January 1951 and he is only obliged to hand over possession when the award is passed because it is the award that requires him to hand over possession. But if the possession of the mortgagee is lawful between July 31, 1947, and January 31, 1951, then the Act makes no provision for his liability to account or for the income or profits that he may derive from the property of which he is in possession. There is a clear lacuna with regard to this matter. I should have thought that if the award does not provide for the period during which the mortgagee is in possession as a mortgagee and does not refer to his liability to account or his liability to give credit to the mortgagor for the profits or income made out of the property, then that question must be determined by the general law rather than by the B. A. D. R. Act. Mr. Vaidya says that in this particular case the mortgagor himself is in possession and therefore whatever question may arise in other cases as far as this particular case is concerned the mortgagee is not entitled to recover rent from the mortgagor.

Now, I see no difference in principle between the case where the mortgagee has let out the property to the mortgagor and the case where the mortgagee himself remains in possession, or the case where the mortgagee lets out the property to a stranger. If Mr. Vaidya was right in his contention, then logically it must follow that the mortgagee would not be entitled to recover rent from the stranger to whom he had let out the property because he would have no title to the property and with regard to his own possession that possession would be wrongful because he would not be entitled to be in possession

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But my view is that it is difficult to take the view that the possession of the mortgagee between July 31, 1947, and January 31, 1951, is wrongful possession. There does not seem to me anything either in the B. A. D. R. Act or under the general law which would deprive the mortgagee of his possession so long as the debt has not been paid. But in my opinion it is not really necessary to decide these interesting questions that arise on this revision application. The suit with which I am dealing is a simple suit between landlord and tenant. It is not disputed that the mortgagor is a tenant and it is not disputed that the mortgagee let out the land to the mortgagor. It is not disputed that the period for which the rent is charged is a period subsequent to July 31, 1947, up to which date the accounts were settled. It may be that the mortgagor may have a right in law to accounts against the mortgagee for the period July 31, 1947, to January 31, 1951, during which he has been in possession, but the decree that has been passed in this suit will in no way affect the right of the mortgagor. If the mortgagor is entitled to accounts against the mortgagee, then what the mortgagee recovers in this suit as and by way of rent would be an item in the accounts and if he is called upon to render accounts he will have to show this item as constituting profits derived by him from the mortgaged property. I express no opinion as to whether a suit filed by the mortgagor for accounts against the mortgagee would be maintainable, but if such a suit were maintainable I do not think that the present decree that has been passed in the Small Causes Court suit would in any way operate as a bar against that suit. Therefore I am deciding this revision application against the petitioner on the ground that as the award gave possession to the mortgagor only on January 31, 1951, and as there is nothing in law to which my attention has been drawn which made the possession of the mortgagee unlawful between July 31, 1947, and January 31, 1951, and as the accounts have been settled only up to July 31, 1947, and as the mortgaged property was let out by the mortgagee to the mortgagor, the mortgagee is entitled to recover rent from the mortgagor.

The revision application fails. Rule discharged. No order as to costs. I direct that a copy of this judgment should be sent to Government.

*Rule discharged.*

M. W. P.

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