

**(1869) 05 CAL CK 0037**

**Calcutta High Court**

**Case No:** Special Appeal No. 435 of 1869

Dharam Nath Tewari and Others

APPELLANT

Vs

Sakriman Dichut and Others

RESPONDENT

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**Date of Decision:** May 26, 1869

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### **Judgement**

Kemp and Glover, JJ.

The point for decision in this appeal is, whether the plaintiff, the mortgagor, by depositing the principal amount due, has saved his equity of redemption or not, it being admitted that the deposit was made within the year of grace. The question turns, upon section 7, Regulation XVII of 1806<sup>(2)</sup>. It is clear, that under that section if the mortgagee has obtained possession at any time before a final foreclosure of the mortgage, the mortgagor's payment or established tender of the principal is sufficient. Now it is clear, that the mortgagees, the special appellants, obtained a decree for possession and wasilat, and that they did give a receipt admitting possession; but it is said that they really never got possession, and that they were opposed by certain zuripeshgidars. Be this as it may, it is clear that it was their own fault if they did not execute their decree for possession and wasilat. It is also admitted, and found by both the lower Courts, that the special appellants are in possession of, at all events fourteen bigas, if not of the whole land, from 1862, and we do not find any ground of special appeal distinctly questioning this finding of fact. We are therefore of opinion that the lower Courts have come to a right decision, and that the plaintiffs have not forfeited their equity of redemption. Whether anything is due by them to the mortgagees is another matter which can be decided between them when the mortgagees bring them to account. The special appeal is therefore dismissed with costs.

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<sup>(1)</sup> Regulation I of 1798, section 2--"In all instances of the loan of money on bai-bill-waffa, or on the condition sale of landed property, as explained in the preamble to this Regulation, however denominated, the borrower, who may be desirous to redeem his land by the payment of the money lent upon it, with any

interest due thereon, within the stipulated period, is at liberty, on or before the date stipulated, either to tender and pay to the lender the amount due to him, taking such precautions as he may think necessary to establish such tender and payment, if evaded or denied, or without any tender to the lender to deposit the amount due to him, on or before the stipulated date in the Dewanny Adawlut of the City or Zilla in which the land may be situated: and the Judge receiving the same, shall furnish the party with a written receipt for the amount, specifying on what date and for what purpose, such deposit may have been made. He shall also, at the same time, cause a written notice of such deposit to be delivered to the lender: and on the application of the latter and his surrender of the conditional bill of sale, or showing satisfactory cause why it cannot be surrendered, shall pay him the amount deposited, and take his acknowledgment to remain among the records of the Court. That there may be no doubt to what amount the deposit in question is to be made, it is required to be as follows: Where the lender has not obtained possession of the land, the deposit is to be the principal sum lent with the stipulated interest thereon, but extending the legal rate of twelve per cent per annum; or if interest be payable, and no rate has been stipulated, with interest at the established rate of twelve per cent; but if the lender has held possession of the land, the principal sum borrowed only need be deposited, leaving the interest to be settled on an adjustment of the lender's receipts and disbursements during the period he has been in possession. In either case a deposit made as above required, shall be considered to preserve to the borrower his full right of redemption; and if the land be in the possession of the lender, shall entitle him to demand the immediate recovery thereof, subject to the adjustment of accounts specified in the following section. Provided, however, that if the borrower in any case shall deposit a less sum than above required, alleging that the sum so deposited is the total amount due to the lender for principal and interest after deducting the proceeds of the lands in his possession, or otherwise, such deposit shall be received, and notice given to the lender as above directed: and if the amount so deposited be admitted by the lender, or be established, on investigation, to be the total amount due to him, the right of redemption shall be considered to have been fully preserved to the borrower, who will not, however in such cases, be entitled to the recovery of his lands, until it be admitted or established that he has paid the full amount due from him."

(2) Regulation XVII of 1806, section 7.--"In addition to the provisions made in the Provinces of Bengal, Bihar, Orissa, and Benares, by Regulation I of 1793, and in the Ceded and Conquered Provinces by Regulation XXXIV of 1803, for the redemption of mortgages and conditional sales of land under deeds of bai-bill-waffa, kut-kabala or any similar designation, it is hereby provided that, when the mortgagee may have obtained possession of the land, on execution of the mortgage deed, or at any time before a final foreclosure of the mortgage, the payment or established tender of the sum lent under any such deed of mortgage and conditional sale, or of the balance due, if any part of the principal amount shall have been discharged, or when the

mortgagee may not have been put in possession of the mortgaged property, the payment or established tender of the principal sum lent, with any interest due thereupon, shall entitle the mortgagor and owner of such property, or his legal representative, to the redemption of his property, before the mortgage is finally foreclosed, in the manner provided for by the following section, that is to say, at any time within one year (Bengal, Fusli and Willaiti, according to the era current where the mortgage may take place), from and after the application of the mortgagee to the Zilla or City Court of Dewanny Adawlut, for foreclosing the mortgage and rendering the sale conclusive, in conformity with section 8 of this Regulation. Provided that such payment or tender be clearly proved to have been made to the lender and mortgagee, or his legal representative; or that the amount due be deposited, within the time above specified, in the Dewanny Adawlut of the Zilla or City in which the mortgaged property may be situated, as allowed for the security of the borrower and mortgagor, in such cases, by section 2, Regulation I of 1798, and section 12, Regulation XXXIV, 1803, the whole of the provisions contained in which sections, as applied therein to the stipulated period of redemption, are declared to be equally applicable to the extended period of one year, granted for an equitable right of redemption by this Regulation."