

(1910) 03 CAL CK 0057

Calcutta High Court

Case No: None

Sakari Datta

APPELLANT

Vs

Sheikh Ainuddy

RESPONDENT

Date of Decision: March 21, 1910

Citation: 6 Ind. Cas. 336

Hon'ble Judges: Teunon, J; Mookerjee, J

Bench: Division Bench

Judgement

1. We are invited in this Rule to set aside a decree of the Court below, by which a suit for mesne profits has- been dismissed as not maintainable under the law. On the 18th February 1900, the plaintiff mortgaged the property to the defendants. In January 1905, he brought a suit for redemption. The usual decree for redemption was made by the Court of first instance on the 15th September 1905. On appeal this decree was modified, on the 19th July 1905, and the mortgagor was directed to deposit the amount determined to be due on or before the 19th September following. The allegation of the plaintiff is that although the judgment-debt was duly deposited, the mortgagee did not deliver possession of the property to him, and that it was not till the 3rd October 1907, that he was able to obtain possession through the assistance of the Court. On the . 21st December 1907, he commenced the present action for recovery of mesne profits which had accrued due on account of the wrongful possession of the mortgagee from the 14th September 1905 to the 3rd October 1907. The Court below has dismissed the suit on the ground that it was not maintainable upon the authority of the case of Rukhminibai v. Subraya Venkatesh Bal Prabhu 31 B. 527 : 9 Bom. L.R. 958. This view has been controverted in this Court on behalf of the plaintiff while on the side of the defendant it has been argued that the suit is not maintainable at all and that, in any event, it is not maintainable in a Court of Small Causes.

2. In so far as the first of these points is concerned, it has been argued on behalf of the defendant that the suit is barred by the principle of res judicata, and reliance has

been placed upon the case of *Satyabadi Behara v. Musavmmat Harabati* 34 C. 223 : 5 C.L.J. 192; *Rukhminibai v. Venkatesh* 31 B. 527 : 9 Bom. L.R. 958 and *Ram Din v. Bhup Singh* 30 A. 225 : 5 A.L.J. 192 : A.W.N. (1908) 96. In our opinion the cases referred to have no application to the circumstances of the present litigation. In those cases, after a valid tender had been made by the mortgagor of the sum due under the security or a deposit had been made by him of such sum in Court, the mortgagor brought a suit for recovery of possession on the ground that the tender had been made and illegally refused or that in spite of the valid deposit, the mortgagee had declined to deliver possession of the property to him. Under such circumstances, it was ruled that it was the duty of the mortgagor in a suit for redemption so brought to include a claim not merely for recovery of possession but also for account of what was due upon the mortgage security. In two of these Cases *Rukminibai v. Venkatesh* 31 B. 527 : 9 Bom. L.R. 958 and *Satyabadi v. Harabati* 34 C. 223 : 5 C.L.J. 192 the subsequent snit for recovery of mesne profits covered the period between the date of the deposit or the tender and the date of delivery of possession under the decree in the redemption suit, and it was ruled that a claim for mesne profits of this description ought to have been included in the previous suit for redemption. No distinction appears to have been drawn between the claim for mesne profits between the date of tender or deposit and the date of the decree in the redemption suit and the mesne profits from the later date to the date of delivery of possession. The reason why the distinction was not drawn was that in each of those casts the period was very short and made no appreciable difference to the plaintiff. That this happened in the case of *Satyabadi v. Harabati* 34 C. 223 : 5 C.L.J. 192 is clear from the concluding portion of the judgment delivered on the application for review [*Harabati v. Satyabadi Behara* 34 C. 646 : 5 C.L.J. 550.] In the case before us, the claim is for mesne profits for the period which intervened between the date fixed for redemption in the decree and the date of actual delivery of possession. In our opinion, there is no room for reasonable doubt that a suit for these mesne profits is maintainable. The test to be applied is, whether the sum now claimed could have been recovered by the mortgagor in the previous suit for redemption. The answer must obviously be in the negative. Reliance, however, has been placed by the learned Vakil for the opposite party upon the decision of the Bombay High Court in the case of *Vinayak Shivrao Dighe v. Dattatraya Gnpal* 26 B. 661. That case is not only of no assistance to the defendant, but when closely examined really negatives his contention. The learned Chief Justice pointed out in that case that the object of a redemption suit was a complete adjustment of the rights for the parties and the decree in such a suit when properly framed would provide for matters even up to the time when it would ultimately be carried into effect. Consequently, in a redemption suit properly framed, accounts may be taken of the profits received by the mortgagee even up to the date fixed for redemption in the decree. In the case before us, no account could possibly have been taken in the1 decree in the redemption suit of any profits which might be realised by the mortgagee on account of wrongful possession retained by him even after the mortgagor had deposited in

Court the amount determined as payable by the redemption decree. The learned Vakil for the opposite party has further contended, upon the authority of the decision of this Court in the case of *Bibijan Bibi v. Sachi Bewah* 31 C. 863, that the relation of mortgagor and mortgagee does not cease upon payment into Court by the mortgagor of the amount determined as due by the redemption decree. In our opinion, there is no foundation for this contention. The case upon which reliance is placed turned upon the construction of Section 89 of the Transfer of Property Act, and it was ruled there that the relation of mortgagor and mortgagee did not cease as soon as the decree was made absolute, but it continued till the property had been sold and the proceeds applied in satisfaction of the mortgage-decree. By analogy it is obvious that as soon as the mortgagor deposits in Court the amount determined as due under the redemption decree, the relation of mortgagor and mortgagee ceases, and it is immaterial whether the mortgagee receives payment of such sum, and delivers possession of the property to the mortgagor. If the contrary view were maintained, it would be impossible to justify on principle the position that the mortgagor becomes entitled to possession of the property immediately upon payment of such sum into Court, because if even thereafter the relationship of mortgagor and mortgagee continues, it is difficult to appreciate at what precise point of time the relationship would subsequently cease, so as to entitle the mortgagor to recover the property from the mortgagee. Reference has also been made on behalf of the defendant to the decision of the Bombay High Court in *Balaji v. Talya* (1887) Bom. P.J. 114, where it was ruled that a mortgagee in possession against whom a decree for redemption had been made was entitled to reap the crop standing on the land. This proposition, if it is assumed to be correct, has obviously no application to the circumstances of the present litigation for it merely implies that when crops are standing on the land, the time for redemption may be extended by the Court u/s 93 of the Transfer of Property Act. We must, therefore, hold that the first contention of the defendant that a suit of this description is not maintainable must be overruled.

3. In support of the second contention, namely, that if a suit of this description is held to be maintainable, it does not lie in a Court of Small Causes, reliance has been placed upon article HI of the second Schedule to the Provincial Small Cause Courts Act. That article provides that "any other suit for account including a suit by a mortgagor after the mortgage has been satisfied to recover surplus collections received by the mortgagee is not maintainable in a Court of Small Causes". This article manifestly has no application to a suit of the description now before us. By no stretch of language, can we appropriately say that this is a suit for accounts, much less is it a suit for accounts by a mortgagor to recover the surplus collections received by the mortgagee. As already explained, the suit is for recovery of sums unlawfully received by the defendant after he had ceased to be mortgagee. Article 81 obviously applies to cases of a very different description, cases, for example, in which a usufructuary mortgagee has been redeemed and possession delivered back

to the mortgagor, but accounts have not been taken as to the surplus collection which might have been received by the mortgagee during the time when he was in possession of the property. The second contention, also, must consequently fail.

4. The result, therefore, is that this Rule is made absolute, and the decree of the Court below set aside. The suit is decreed for Rs. 25 which we determine as the value of the mesne profits upon the evidence on the record. This sum will carry interest at the rate of six per cent, per annum from the date of the institution of the suit to the date of realization. The plaintiff will be entitled to full costs of this Rule but only half costs in the Court below. We assess the hearing fee in this Court at one gold mohur.