

(1880) 06 CAL CK 0024

Calcutta High Court

Case No: Appeal from Orders Nos. 174 and 175 of 1879

Doolie Chand and
Others

APPELLANT

Vs

Omda Khanum alias
Baboo Shubibu and
Others

RESPONDENT

Date of Decision: June 3, 1880

Judgement

Pontifex, J.

The main question in this appeal is, whether a mortgagee, who has obtained a decree for accounts and sale, is entitled to withdraw from the execution-proceedings when those accounts appear to be going against him. There is a subsidiary question, viz., if he is not so entitled, upon what principles are the accounts to be taken between the parties?

2. Now we think, that the essence of foreclosure and Redemption suits is, that in such suits each party is entitled to enforce his rights. A Plaintiff claiming foreclosure is bound, upon the accounts being taken, if the balance is against him, to pay that balance. On the other hand, a Plaintiff claiming redemption must submit to a decree for sale or foreclosure if he makes default in payment. Unless this were so, there would be a multiplicity of suits. To avoid this, it is necessary, under decrees for foreclosure or redemption, that the accounts between the parties should be settled and discharged. In this (sic) the Plaintiff obtained a decree on the 12th May 1862 upon (sic) -deed, and he claims that, previously to the mortgage to him, he held under the mortgagor, the predecessor in title of the Defendants, a zur-i-peshgi lease, and he also claims, as I, understand, that at the expiration, or soon after the expiration, of the zur-i-peshgi, the Defendants themselves entered into another ticca arrangement with him. A question that has been repeatedly raised in this suit, and which has been before the High Court no less than four times, is, whether the Plaintiff is to be treated as a mortgagee in possession in taking the. accounts,--that is to say, whether the zur-i-peshgi deed and alleged ticcadari are to be disregarded.

3. At first, by some inadvertence in Mr. Justice Phear's judgment, it seems to have been laid down that he was to be treated as a mortgagee in possession; but, on a subsequent appeal, Mr. Justice Phear distinctly stated that, if that construction had been placed upon his judgment, it was what he never intended. Of course, if the mortgagee held possession under any contract of title distinct from his mortgage, he would be entitled to set up that title, and insist that his possession under that contract was distinct from his mortgage title, and that he could, during such possession, only be charged with rent payable under that distinct contract. Now, when the case came before Mr. Justice Phear on the 13th March 1875, a decree was passed by this Court, directing that certain accounts should be taken, and under the terms of that decree as it stands, the Plaintiff would have to account as a mortgagee in possession. Although that decree has not actually been set aside, and although no decree has been made in its place, yet it clearly appears from the judgment of Mr. Justice Phear of the 28th July 1876, that it was not the intention of the Court that the account should be taken against the mortgagee as against a mortgagee in possession. It is therefore necessary for us now to do justice between the parties. We agree with the lower Court in thinking that the mortgagee is not entitled to withdraw from the taking of accounts in his execution-proceedings at his own will and pleasure. The decree of Mr. Justice Phear of the 13th March 1875 directed that the Defendant, if a balance was due from him, should pay such balance to the Plaintiff, and if, on the other hand, a balance was due from the Plaintiff, he should pay such balance to the Defendant; and that appears to us to be the proper principle upon which a decree should be made.

4. We therefore dismiss the appeal on the main ground which has been taken before us.

5. In sending back the case to the Court below, we think we ought to point out distinctly, and so as to prevent future litigation between the parties, the principles upon which the accounts should be taken. We are of opinion that an account should be taken half-yearly of the interest due from the mortgagor under the mortgage-deed, and that, from such half-yearly amounts of interest, should be deducted the rent payable but unpaid by the mortgagee during such half year under any contract for possession, separate and independent of the mortgage; and if, for any period the mortgagee was in possession, rent became due under any such separate or independent contract, during such period, he should be charged as a mortgagee in possession. The balance of interest half-yearly (if any) will not carry interest up to the date of the decree. But an account must be made up, as on the date of the decree of the 12th May 1862, of the principal and interest, after making such deductions as I have mentioned, due to the Plaintiff at that time. Upon that aggregate amount interest will again be calculated at one per cent per mensem, and against the Subsequent half-yearly" accounts must be set off the amounts payable and unpaid by the mortgagee in respect of rent under any contract for possession, separate and independent of the mortgage; and for any

period uncovered by such separate and independent contrast, such a sum as should be charged against a mortgagee in possession.

6. The accounts being so taken, the mortgagor must pay the balance, if any, found due from him on such account, to the Plaintiff, the mortgagee. On the other hand, if a balance is found due from the Plaintiff, the mortgagee, to the Defendant, the Plaintiff must pay such balance to the Defendant.

7. We think, in order to put a stop to further litigation between the parties, that, if any difficulty arises in carrying out this order, the parties should have liberty to apply direct to this Court. As the Appellants have failed on the main point of their appeal, they must pay the costs of this appeal.

8. The record will be sent down at once, and the parties must carry in their accounts within six weeks of the arrival of the record in the Court below, with liberty for such Court to extend the time on a proper case being made.