

(1866) 09 CAL CK 0011

Calcutta High Court

Case No: Regular Appeal No. 443 of 1864

Maharanee Wuzuroonessa

APPELLANT

Vs

Bebbee Saeedun and Others

RESPONDENT

Date of Decision: Sept. 17, 1866

Judgement

Sir Barnes Peacock, Kt., C.J.

The plaintiffs in this case sued to redeem a mortgage, and one of them sought to compel the defendants to account for the usufruct. The Principal Sudder Ameen decided the suit against the plaintiffs, and held that they were not entitled to redeem. In that respect we think that the Principal Sudder Ameen was wrong, and therefore that his decision must be reversed. But considering that the mortgage-money was paid into Court in two separate amounts, and that two separate suits were brought for redemption of the estate, that one of the plaintiffs sought to have an account of the wasilat which the defendants had recovered under their decree, and that we reverse the decision of the Principal Sudder Ameen altogether, we think that the plaintiffs must severally pay the costs of the suits below, and also the costs of these appeals. We think that the plaintiffs are entitled to redeem the mortgage upon payment of the principal sum of money which is due. It does not appear to be very clear whether the money which was brought into Court by the plaintiffs still remains there. If it has been paid out of Court to the defendants it must be deemed to have been received by them from the plaintiffs in satisfaction of the mortgage debt. If it remains in Court it will be paid out of Court in satisfaction of the mortgage debt.

2. The only question now remaining is whether the defendants were bound to account for the wasilat. With reference to the whole case, I do not think that I can add anything to that which I recorded when the case came before me as a third Judge. There is a wide distinction between usufruct collected by a mortgagee in possession, and damages which are awarded to a mortgagee in a suit brought by him against the mortgagor for evicting him. We think that the defendants were not bound, under the words or the spirit of Regulation XV of 1793 or Regulation I of

1798, to account for the wasilat or damages which they have received under the decree in the suit brought by them against the mortgagor for possession. If a mortgagor wrongfully turns a mortgagee out of possession it is his own fault, and the mortgagee is entitled to retain any wasilat which he may recover against the mortgagor, and is not bound to account for it. To prevent an evasion of the usury laws the Regulation compelled the mortgagee to account for the usufruct; if that exceeded interest at 12 per cent, the balance was to be accounted for. We think that a Regulation of this kind must be construed strictly, and that we ought not so to construe it as to substitute wasilat recovered by a decree of Court for usufruct enjoyed by a mortgagee. The case of Chutterdharee Kower v. Ramdoolun Kower S.D.A., 1859, 1181 is a case very much in point, though the question arose in a different form. I should add that the defendants will be prevented by this decree from executing their decree for wasilat for any period subsequent to the date on which they might have received the principal. If they have taken the money out of Court they must be deemed to have taken the principal out of Court, and having had the principal in their hands from that time, they will be restrained from executing the decree for wasilat for any period subsequent to the date on which they received the money out of Court. But, on the other hand, if the money remains in Court, they will be entitled to proceed to execution under that decree up to the date of this decree, when the mortgage must be considered to have been substantially redeemed, and the defendants entitled to take the money out of Court.