

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Handley.

SHIVA DEVI (PLAINTIFF), APPELLANT,

v.

JARU HEGGADE AND OTHERS (DEFENDANTS), RESPONDENTS.*

*Civil Procedure Code, s. 111—Transfer of Property Act—Act IV of 1882, ss. 2, 76
—Waste by mortgagee in possession—Possession after date fixed for payment—
Interest.*

In a suit in 1888 to recover principal and interest due on a usufructuary mortgage executed on 15th June 1870 which contained a covenant for repayment of the secured debt on 15th June 1878, the defendant pleaded and proved that the mortgagee had permitted certain buildings on the mortgage premises to fall into a ruinous condition and it appeared that the mortgagee had remained in possession after June 1878 :

Held, (1) that the defendant was entitled to have the amount of the loss occasioned by the plaintiff's failure to make repairs brought into the mortgage accounts under Transfer of Property Act, s. 76, and a separate suit by him for that amount was not necessary.

(2) that the profits derived by the mortgagee after the date fixed for repayment should be regarded as having been enjoyed in lieu of interest.

SECOND APPEAL against the decree of S. Subbayar, Subordinate Judge of South Canara, in appeal suit No. 282 of 1889, affirming the decree of S. Raghunathaya, District Munsif of Karkal, in original suit No. 201 of 1888.

The facts of the case are stated above sufficiently for the purpose of this report.

The plaintiff contended that the defendant could not recover in respect of the plaintiff's waste by way of set-off under Civil Procedure Code, section 111. As to this the Subordinate Judge held that that section had no application to the case which was governed by Transfer of Property Act, section 76. As to his claim to interest the Subordinate Judge said :—

“The next question is whether the plaintiff is entitled to claim any interest. She is admittedly in possession of the mortgaged property under the mortgage deed, which provides that the mortgagee should appropriate the profits in lieu of interest and that

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“ the mortgagor should not claim surplus profits or the mortgagee
“ a higher interest than 12 per cent. per annum ; but the plaintiff
“ contends that the money was repayable on the 15th June 1878,
“ and that after that date the stipulation for appropriation of the
“ proceeds towards the interest is not obligatory. *Baldeo Panday*
“ v. *Gokal Rai*(1) and *Mansab Ali v. Gulab Chand*(2). In the
“ absence of evidence on either side to show the income of the
“ property, it must be presumed that the income did not fall short
“ of the 12 per cent. interest agreed to be paid under the bond.
“ Otherwise the mortgagee would have brought his suit soon
“ after the expiry of the term. I think therefore that interest was
“ properly disallowed.”

The plaintiff preferred this second appeal.

Narayana Rau for appellant.

Pattabhirama Ayyar for respondents.

JUDGMENT.—The first point raised is that the set-off was wrongly allowed, and in support of this contention we were referred to the decision in *Raghu Nath Das v. Ashraf Husain Khan* (3). We do not think the case has any application. The point here raised was not there taken and that decision was prior to the passing of the Transfer of Property Act. We agree with the Sub-Judge that section 76 applies. The question is one of procedure and the estimation of the loss caused to the mortgagor by the failure of the mortgagee to make necessary repairs is an item which must be considered in determining the accounts in settlement of the mortgage.

It was a paramount duty for the mortgagee to make such necessary repairs, and we cannot accept as valid the excuse that to do so would diminish his interest or profits.

We think the Subordinate Judge rightly held that as the mortgagee continued in possession after 13th June 1878 the profits must be regarded as having been enjoyed in lieu of interest.

The appeal is dismissed with costs.

(1) I.L.R., 1 All., 603.

(2) I.L.R., 10 All., 85.

(3) I.L.R., 2 All., 252.