

APPELLATE CIVIL.

Before *Mr. Justice Muttusami Ayyar and Mr. Justice Best.*

SUBBA RAU (PLAINTIFF), APPELLANT,

v.

DEVU SHETTI (DEFENDANT), RESPONDENT.*

1894.
March 21.
September 27.

*Mortgage—Part breach of contract by mortgagee—Contract Act—Act IX of 1872, s. 39
—Rescission—Acquiescence—Suit by mortgagee for interest due under the mortgage
as regards the part fulfilled.*

A mortgaged certain land to B for Rs. 800 Under the terms of the mortgage deed B was to pay Rs. 500 of the advance to C in discharge of a previous mortgage executed by A in favour of C. Of the balance of Rs. 300, B was to retain Rs. 200 in payment of a previous debt of A due to him, and the balance of Rs. 100 was to be paid to A. B paid the said Rs. 100, retained the Rs. 200, but neglected to pay the said Rs. 500 to C, who sued A and recovered the debt by attachment and sale of A's movable property. After eight years from the date of the mortgage B brought a suit to recover the interest due under the mortgage on Rs. 300 only:

Held, that under s. 39 of the Contract Act, A was entitled to cancel the contract of mortgage owing to B's conduct, but that he was bound to give up the benefit he had received, viz., Rs. 300 and pay interest thereon up to the date of cancellation. B was not entitled to treat the original mortgage as a mortgage in force with all its stipulations for Rs. 300 instead of Rs. 800, and on that view to sue for interest alone.

SECOND APPEAL against the decree of O. Chandu Menon, Subordinate Judge of South Canara, in appeal suit No. 373 of 1892, confirming the decree of U. Babu Rau, District Munsif of Udipi, in original suit No. 103 of 1892.

The facts of the case appear sufficiently for the purpose of this report from the judgments of the High Court.

Pattabhirama Ayyar and Madhava Rau for appellant.

Narayana Rau for respondent.

BEST, J.—The mortgage bond executed by defendant in favour of plaintiff was for a sum of Rs. 800, of which Rs. 500 were left with plaintiff to pay off a prior mortgage debt and of the balance Rs. 200 are stated in A to be the amount previously borrowed from plaintiff and the remaining Rs. 100 as received on the date of A.

It appears that plaintiff did not pay off the prior mortgagee,

* Second Appeal No. 1634 of 1893.

who therefore sued the defendant, and recovered his debt by attachment and sale of defendant's movables.

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Plaintiff's present suit is to recover the proportionate interest due on the Rs. 300 only for a period of eight years.

I am unable to agree with the lower Courts in holding that he is not entitled to this proportionate interest, *cf. Chinnayya Rawutan v. Chidambaram Chetti*(1); but I think the suit as brought has been rightly dismissed.

Under the circumstances, the plaintiff must wait till he can sue for the principal amount also, when the defendant will be able to set off the amount claimed by him as damages for plaintiff's failure to pay off the prior mortgagee.

I would dismiss this appeal with costs.

MUTTUSAMI AYYAR, J.—The facts found in this case are (1) that by the instrument of mortgage the plaintiff was bound to pay Rs. 800, (2) that he paid the mortgagor only Rs. 300, (3) that he never paid Rs. 500 to a prior mortgagee as stipulated in the instrument, (4) that by reason of his default the prior mortgagee sued the mortgagor, obtained a decree against him and recovered the sum from him. The Subordinate Judge considered that, owing to appellant's failure to perform his part of the contract in regard to Rs. 500, and of the respondent being compelled by his default to satisfy the prior mortgagee, the latter was not bound to perform his part of the contract to pay interest on Rs. 300 at the rate stipulated in the instrument of mortgage. Under section 39 of the Contract Act, the mortgagor was entitled to cancel the contract of mortgage on the ground that the mortgagee by acting in contravention of his agreement incapacitated himself for performing it in its entirety. Though no less than eight years passed subsequent to the payment of the prior mortgage by respondent, the appellant never attempted to tender Rs. 500 to respondent to keep the prior mortgage in force. Upon the facts found the Subordinate Judge obviously considered the original mortgage as lawfully cancelled, and held that the stipulation therein as to interest as not being since in force. I am of opinion that he was right in treating the original contract as at an end. In putting an end to it, however, respondent was bound to give up the benefit he had received and to pay back Rs. 300 with interest up to date of cancellation. Appellant might

(1) I.L.B., 2 Mad., 212.

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have sued respondent to enforce this obligation and to recover Rs. 300 and interest as damages on the security of the property. He was clearly not entitled to treat the contract of mortgage for Rs. 800 as still subsisting after acquiescing in its cancellation by respondent for eight years and then bringing this suit to recover only the interest due on Rs. 300 as due under the original contract. The only obligation which he can now enforce is the obligation to repay Rs. 300 with interest, which respondent was bound to pay when he put an end to the mortgage as regards Rs. 500. He was not entitled to treat the original mortgage as a mortgage in force with all its stipulations for Rs. 300 instead of Rs. 800, and on that view to sue for interest alone. I would also dismiss this appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

SEETA PATTA MAHADEVI (DEFENDANT), APPELLANT,

v.

SURYUDAMMA AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

1894.
 August 22.
 September 26.

Costs—Whether an unsuccessful plaintiff is liable for costs unnecessarily incurred by the defendant owing to his vakil's negligence.

The costs which a defeated plaintiff should be required to pay are those necessarily incurred by the successful party in the defence of the suit. Costs cannot be deemed necessary if by reasonable diligence on the part of the defendant or his pleader the expenditure of them could have been avoided.

APPEAL against the decree of N. Swaminadha Ayyar, Subordinate Judge of Vizagapatam, in original suit No. 51 of 1892.

The facts of the case appear sufficiently for the purpose of this report from the judgments of the High Court.

Pattabhirama Ayyar for appellant.

Respondents were not represented.

SHEPHARD, J.—This appeal relates to the costs which the Subordinate Judge refused to allow to the defendant when dismissing