

APPELLATE CIVIL.

Before Mr Justice Benson and Mr. Justice Sundara Ayyar.

BAYYA SAO (TRANSFEREE FROM PLAINTIFF), APPELLANT,

v.

NARASINGA MAHAPATRO AND OTHERS (DEFENDANTS

Nos. 1 TO 11), RESPONDENTS.*

1911.
February,
24.
March, 7.

Transfer of Property Act IV of 1882, s. 83--Tender under s. 83 in one Court subsequent to suit by mortgagee, in another Court to enforce his mortgage invalid--Where mortgagee entitled to possession mortgagee must be put in possession before deposit under s. 83--Costs, right of mortgagee to.

Where after the institution of a suit by the mortgagee to enforce his mortgage in one Court, the mortgagor deposits the amount in another Court under section 83 of the Transfer of Property Act, the deposit is not a valid one and cannot have the effect of stopping the running of interest on the amount deposited.

Where the mortgagor proposes to take action under section 83 of the Act, he must have a valid right to redeem under his contract with the mortgagee. No deposit can be made if the mortgagee being entitled to possession is not put in possession.

Ram Sonji v. Krishnaji [(1902) (I.L.R., 26 Bom., 312)], followed.

A mortgagee is entitled to his costs unless there are special reasons dis-entitling him to them.

APPEAL against the decree of T. T. Rangnohariat, District Judge of Ganjām in Original Suit No. 29 of 1905.

The facts are sufficiently stated in the judgment.

C. S. Venkatachariat for appellant.

The Hon. Mr. T. V. Seshagiri Ayyar for respondents.

JUDGMENT.—The facts necessary for the decision of this appeal may be briefly stated. Defendants Nos. 1 to 11 are related to one another, but are not members of an undivided family. Defendants Nos. 1 to 3 belong to one family, defendants Nos. 4 to 7 to another and defendants Nos. 8 to 11 to a third family. The other defendants in the suit are only formal parties. The eleven defendants, who are the owners of an inam village, executed three registered usufructuary mortgage deeds in 1885 in favour of the plaintiffs, according to the terms of which the debt was to be

*Appeal No. 175 of 1908.

BENSON
 AND
 SUNDARA
 AYYAR, JJ.
 BAYYA SAO
 v.
 NARASINGA
 MAHAPATRO.

discharged out of the usufruct of certain lands by the end of the harvest of the year Krodhi (1904-1905). In the years 1899-1900 further sums were borrowed under exhibits E, D, C and A. These amounts were also to be paid up at the time stipulated for the discharge of the previous bonds, and, if the defendants failed to do so, the mortgaged lands were to continue in the possession of the plaintiffs for a further period of five years. The terms of exhibits A, C, D and E are not exactly similar. Exhibits A and D provide that the lands should remain in the possession of the plaintiffs for a period of five years from the 15th Palgunna Suddha of Krodhi (the 21st March 1905), if the amounts due thereunder were not paid by that date. Exhibits C and E provide for the execution of mortgage bonds in case of non-payment before the 15th Palgunna Suddha of Krodhi (the 21st March 1905), entitling the plaintiffs to hold possession of the lands as security for their debt for a period of five years, and sets out the terms on which they were to hold them. But it is evidently understood under these documents also that the defendants would not be entitled to get possession before the end of the further period, if they failed to pay the debts before the time fixed for payment. Those defendants took possession of the lands about the close of May 1905 according to the finding of the lower Court. On the 27th January 1905, the representatives of the three families sent to the plaintiff the notice, exhibit II, stating that the time fixed in the bonds of 18:5 up to which the plaintiffs were entitled to be in possession of the mortgaged lands would expire with that year's paddy crop, that they were prepared to pay the amounts due under exhibits C, D and E and that the accounts with respect to the amounts due under them should be settled through mediators. It may be noticed that no reference is made in this document to the mortgage bond, exhibit A, the position taken up by the defendants apparently being that the plaintiffs had not lent the amount mentioned in that document, and nothing was therefore due to them from the defendants on it. The suit is for the recovery of possession of the lands, which the plaintiffs claim to be entitled to hold till the discharge of the debts due to them under exhibits A, C, D and E and for mesne profits from the debt of dispossession. The defendants contend that they are entitled to redeem the mortgages before the expiration of five years, and that the plaintiffs are not therefore entitled to possession. They also plead

that nothing is due to the plaintiffs under exhibit A as the consideration due on that document was no paid to them by the plaintiffs. Subsequent to the institution of this suit, which was on the 2nd August 1905 the defendants put in petitions on the 25th August 1905 under section 83 of the Transfer of Property Act in the District Munsif's Court of Sompeta depositing the amounts due under exhibits C, D and E. Only the second plaintiff appeared in answer to the notice given of this petition and he declined to receive the amount deposited in Court in full satisfaction of the debt. The defendants contended that the plaintiffs were not entitled to interest on exhibits C, D and E after their refusal to receive the amount deposited.

The principal questions before the lower Court were whether interest on the bond in favour of the plaintiffs ceased in consequence of the tender made in the District Munsif's Court, whether the bond (exhibit A) was not supported by consideration, and whether the plaintiffs were disentitled to recover possession in consequence of the defendant's alleged right to redeem notwithstanding the provision in the bonds that the plaintiffs were entitled to remain in possession of the lands for five years from the end of Krodhi (the 4th April 1905). The District Judge decided the last question in favour of the defendants, and directed that the plaintiffs should receive the amounts deposited for exhibits C, D and E from the District Munsif's Court of Sompeta. He also held that the plaintiffs were not entitled to interest after the deposit. With regard to the consideration for exhibit A, he came to the conclusion that only Rs. 100 out of the total amount of Rs. 300 was paid (on the 17th May 1903), and he gave the plaintiffs, a decree for that amount and interest, and further interest till date of payment, and directed that in case of failure by the defendants to pay the amount by the 30th December 1907, the plaintiffs should be placed in possession of the lands mortgaged under it. He held that though the suit was rightly instituted by the plaintiffs when it was brought, the parties might have amicably arranged their disputes without persisting in the litigation, and he, therefore, ordered that the defendants should pay the plaintiffs the full stamp duty paid by them on the plaint and one-half of the subsequent costs.

The decree in so far as it disallowed the plaintiff's claim for possession is not appealed against. The appellant impeaches the

BENSON
AND
SUNDARA
AYYAR, J.J.
BAYYA SAO
v.
NARASINGA
MAHAPATRO.

BENSON
AND
SUNDARA
AYYAR, JJ.
BAYYA SAO
NARASINGA
MAHAPATRO.

judgment of the lower Court on three points : *first*, the finding that the Rs. 200 out of the consideration for exhibit A was not paid ; *secondly*, the finding that the tender under section 83 of the Transfer of Property Act was valid as against the plaintiffs and disentitled them to subsequent interest ; *thirdly*, the order about costs.

We are of opinion that the finding of the District Judge on the question of the payment of the consideration for exhibit A is incorrect. We are therefore of opinion that the whole consideration due for exhibit A was paid by the plaintiffs.

The next question is whether the tender under section 83 of the Transfer of Property Act subsequent to the suit was valid in law so as to disentitle the plaintiffs to interest after the deposit. We have come to the conclusion that the deposit is not valid. Section 83 of the Act, no doubt, lays down that "at any time after the principal money has become payable and before a suit for redemption of the mortgaged properties is barred, the mortgagor may deposit in any Court in which he might have instituted such suit to the account of the mortgagee the amount remaining due on the mortgage." It does not say that the deposit must be made before a suit is instituted by the mortgagee to enforce his rights under the mortgage by sale, foreclosure or otherwise. But we are of opinion that it could not have been intended to make such a material departure from the ordinary rules relating to tender as would be involved in holding that, after one Court has taken cognizance of a suit for the enforcement of a mortgage, the mortgagor has the right to deposit the mortgage amount in another Court. Under sections 86 and 88, the Court in a suit for foreclosure or sale, is to direct an account to be taken of what will be due to the plaintiff for *principal and interest* on the mortgage and for his costs of the suit on a date to be fixed by the Court according to those sections. Under section 67 a mortgagee, "at any time after the mortgage money has become payable to him, and before a decree has been made for the redemption of the mortgaged property, or the mortgage money has been paid or deposited as hereinafter provided" (*i.e.*, under section 83) has a right to obtain an order for foreclosure or sale. "A suit to obtain an order that a mortgagor shall be absolutely debarred of his right to redeem the mortgaged property is called a suit for foreclosure." These sections must be read together

with section 83. There is no doubt that the general rule is that a tender of money must be made before the creditor institutes a suit for its recovery (see Harris on 'Tender,' pp. 158 and 159, where the learned author quotes the numerous cases which show that the law on the point is quite settled). The same rule is ordinarily applicable to mortgage debts also. (See pp. 163 and 164 of the same book, and *Briggs v. Calverly* (1) per Lord KENYON, C.J., and also Coate's Law of Mortgages, volume I, p. 735.) In England a special statute VII, George II, cap. 20, is in force by which a mortgagor may tender the amount and ask for a stay of the action before the hearing. No such provision is made in section 83. It is very unlikely that it would not have been made, if it were intended that a deposit could be made after an action brought for the mortgage money. It will be noticed that according to the English statute, the mortgagor is to ask for stay of the action, that is, to take a step with respect to the mortgagee's action itself. The Indian Legislature must no doubt have been aware that according to section 83, the deposit need not be necessarily in the Court trying an action to enforce the mortgage, and it is very unlikely that some specific provision would not have been made with respect to the continuance of the mortgagee's suit, if the mortgagor could take action in another Court under section 83 of the Act, moreover, when a court having plenary power over the subject matter of a cause has already taken cognizance of it, it will not conduce to convenience that another tribunal with very restricted jurisdiction should be invested with the right to deal with it. At any rate clear words would be used to indicate such an intention. It is unnecessary to decide whether a mortgagor could, subsequent to the mortgagee's suit, deposit the mortgage amount in the very Court in which the suit is pending, although on the language of the section it might not be easy to make a distinction. But it seems to us clear that it could not have been intended to enable the mortgagor to make a deposit under the section in a different Court from that in which the mortgagee's suit is pending. It is hardly necessary to point out that according to the construction contended for by the respondent there would be nothing to prevent the mortgagor from proceeding

BENSON
AND
SUNDARA
AYYAR, JJ.
BAYYA SAO
v.
NARASINGA
MAHAPATRO.

BENSON
AND
SUNDARA
AYYAL, JJ.
BAYYA SAO
v.
NARASINGA
MAHAPATRO

under section 83 even after a decree for sale has been passed. No case has been cited to us, nor are we aware of any, against the view we are inclined to hold, and on general principles we think the appellant's contention should prevail. We are of opinion that when a suit has once been instituted, payment into Court is regulated by order XXIV, rule 1 of the new Procedure Code corresponding to section 376 of the old Code. We do not think that the circumstance that the defendants were not aware of the institution of the suit when they made their application in the Sompeta Munsif's Court would affect the plaintiff's right to proceed with their suit and to enforce their rights as they stood on the date of the suit.

There is a further ground on which we think that the deposit in this case is not valid. The mortgagors took possession of the property in May 1905 without discharging the mortgages, although according to the provisions of exhibits A, C, D and E, the mortgagees were entitled to remain in possession of the property as security for the amounts due on these bonds. They were not justified in doing so. They were bound to restore possession to the plaintiffs and to allow them to remain in possession before making a deposit under section 83. In similar circumstances the Bombay High Court held in *Ram Sonji v. Krishnaji*(1) that the deposit was premature and invalid. In that case the mortgagor made the deposit without putting the mortgagee in possession which he was entitled to if the debt was not paid on a certain date. Chandravarkar, J, delivering the judgment of the Court observes: "The mortgagor having committed a default, the mortgagee became entitled to possession on that date. The mortgagee did not, however, get possession until the 3rd April 1898; but before that date, *i.e.*, on the 19th March 1898, the mortgagor had deposited the mortgage amount in Court under section 83. But the mortgagor could not defeat the right of possession which had accrued to the mortgagee by making a tender of the mortgage amount on the 19th March 1898, as, according to the consent decree, the right to redeem could accrue only after the mortgagor had delivered possession to the mortgagee. The tender made on the 19th March was under the

(1) (1902) I.L.R., 23 Bom., 312.

circumstances premature and the provisions of sections 83 and 84 cannot apply to the facts of the case.

Following the Full Bench ruling in *Tani Bhagwan v Hari Bin Bhawani*(1) and *Malhar Gopal Kulkarni v. Anandram Valad Hukumchand*(2) we reverse the decree of the lower Appellate Court."

BENSON
AND
SUNDARA
AYYAR, JJ.
BAYYA SAO
v.
NARASINGA
MAHAPATRO.

We think, concurring with the Bombay High Court, that section 83 presupposes that the mortgagor, when he proposes to take action under section 83, has a valid right to redeem and is not attempting to exercise the right of redemption in a manner contrary to the provisions of the contract between the parties.

We are also of opinion that the order of the lower Court as to costs cannot be maintained. A mortgagee is entitled to his costs unless there are special reasons disentitling him to them.

Moreover in the view we have taken of the other questions dealt with above, the plaintiffs, are clearly entitled to the whole of their costs in the lower Court. The decree of the lower Court must further be modified by directing the defendants to pay the whole amount due under exhibit A with interest on Rs. 200 from 15th August 1904 up to the date of payment in the manner calculated by the lower Court and by further directing them to pay interest on the bonds exhibits C, D and E up to the date of payment calculated in the same manner. The time for payment is extended up to the end of six months from this date. The appellant is entitled to costs of this appeal calculated on the amount awarded by us.

(1) (1887) Printed Judgment, p. 315.

(1889) Printed Judgment, p. 51.