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v.  
MASIAT  
KHAN.

This appeal therefore cannot be allowed. It is no doubt a hard case for the appellant, who has suffered serious loss through the blunder of the Government officials. He, however, has his remedy under section 315 of the Code of Civil Procedure. Our order is that this appeal be dismissed with costs.

*Appeal dismissed.*

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*February 1.*

## MISCELLANEOUS CIVIL.

*Before Mr. Justice Knox and Mr. Justice Aikman.*

NEMI CHAND AND ANOTHER (DEFENDANTS) v. RADHA BALLABH (PLAINTIFF) AND NANNA AND OTHERS (DEFENDANTS) AND RADHA BALLABH (PLAINTIFF) v. NEMI CHAND AND OTHERS (DEFENDANTS).\*

*Regulation No. III of 1877 (Ajmere Laws) section 33—Mortgage—Suit for redemption—Application of the rule of “dam depat.”*

*Held* that the rule laid down by section 33 of Regulation III of 1877 applies only to cases in which money is payable by the defendant to the plaintiff, and is not applicable to a suit for redemption of a mortgage. *Nawab Azimul Ali Khan v. Jowahir Singh* (1) referred to.

THIS was a reference made under the provisions of sections 17 and 19 of Regulation No. 1 of 1877 by the Commissioner and District Judge of Ajmere-Merwara. The facts out of which the reference arose are thus stated in the referring order:—

“Defendants 3 to 6 mortgaged (in October 1887), with possession, to defendants 1 and 2 certain immovable property, of which defendants 1 and 2 entered into possession of seven shops only. Interest was payable on the mortgage money at 10 annas per cent. per mensem. The amount of the mortgage money was Rs. 9,800. The mortgagees were to collect the rent and profits and appropriate them, firstly, to interest and secondly, to principal, with compound interest at 1 per cent. per mensem if these collections were less than the interest due under the mortgage. The mortgages were two; the first for Rs. 9,000, being a simple mortgage usufructuary, and the second for Rs. 800, a simple mortgage.

“The mortgagors mortgaged their right of redemption to third parties on July 18th, 1892. These third parties obtained

\*Miscellaneous No. 99 of 1903.

(1) (1870) 13 Moo., I. A., 404, at p. 414.

a decree against the mortgagors, to which the mortgagees were parties, under which it was directed that an account should be taken under the mortgages and the property sold subject to the mortgagees' lien for the amount due to them under the account. No such account was taken, however, and the property was sold, the present plaintiff becoming the purchaser at the sale. Plaintiff now sues for the redemption of the mortgages on the payment of Rs. 7,191-10-9, pleading that the mortgagees did not obtain possession of the whole of the property, as they might have done, and that they failed to obtain full rents for the property of which they were in possession. The defendants (mortgagees) pleaded that they could not be held responsible for any deficiency in the rents realized and the plaintiff could not obtain redemption for less than Rs. 20,200 calculated as follows:— Rs. 9,800 principal; Rs. 9,800 interest; Rs. 600 costs for repairs executed by the mortgagees.

“Both the local Courts have held that the plaintiff is bound to pay the defendants before redemption all sums which the mortgagors would have had to pay if they had brought a suit for redemption, and that the mortgagees had been guilty of no neglect. It was then sought to determine the state of account between the parties. For this purpose, with reference to section 33 of the local Regulation III of 1877, Rs. 9,800 has been taken as the amount of principal sum of money and Rs. 9,800 as the amount of interest, from which Rs. 5,873-7-3 have been deducted on account of rents, etc., realized by the mortgagees, the items claimed by plaintiff on account of rents of property left in possession of the mortgagors being disallowed. The plaintiff in the result has obtained a decree entitling him to redeem the property on payment to the mortgagees of the sum of Rs. 13,784-10-9. The questions of law or usage having the force of law referred by both parties are as follows:—

“By the plaintiff. That he is entitled as against the mortgagees to deduct from the sum on which he can obtain redemption the rents and profits which the mortgagees might have obtained for the property of which they did not take possession.

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“That the mortgagees were estopped from pleading as against plaintiff that they were not in possession of any of the property.

“That the principle of section 76 of the Transfer of Property Act applied to the case.

“By the defendants. That section 33 of Ajmere Regulation III of 1877 had no application to mortgage suits and did not apply to suits in which all the parties were not Hindus.

“These various questions are discussed and decided in the judgments of the local Courts adversely to those who have raised them. As to the point of estoppel no issue was framed on this subject in the Court of original jurisdiction, nor was estoppel a ground of appeal. In my opinion both references may be dismissed, each party bearing his own costs.”

Babu *Jogindro Nath Chaudhri*, for Nemi Chand and another.

Mr. *A. H. C. Hamilton*, for Radha Ballabh.

KNOX and AIKMAN, JJ.—This is a reference made by the Commissioner and District Judge of Ajmere-Merwara under section 17 of the Ajmere Courts Regulation, No. I of 1877. The questions referred are thus set out:—“By the plaintiff. That he is entitled as against the mortgagees to deduct from the sum on which he can obtain redemption the rents and profits which the mortgagees might have obtained for the property of which they did not take possession.

“That the mortgagees were estopped from pleading as against plaintiff that they were not in possession of any of the property.

“That the principle of section 76 of the Transfer of Property Act applied to the case.

“By the defendants. That section 33 of Ajmere Regulation No. III of 1877 had no application to mortgage suits and did not apply to suits in which all the parties were not Hindus.”

We have heard counsel on both sides. Bearing in mind the findings of the Courts below, to the effect that no laches has been shown on the part of the mortgagees, we hold that the first plea of the plaintiff is not entitled to any weight. As regards

the second, the Commissioner has pointed out that no issue has been framed on the point in the Court of original jurisdiction and it was not made a ground of appeal by the plaintiff. It was for the plaintiff to set it up. He has not done so, and there are no materials on the record upon which such a plea can be sustained. On this question also our decision is against the plaintiff.

With regard to the pleas taken by the defendants, the learned advocate who appears for them has very properly admitted that he cannot support the second plea—that section 33 of Regulation III of 1877 does not apply to suits in which all the parties are not Hindus. He admits that the first part of the plea had been more widely worded than is necessary for his case. He so far supports the plea as to maintain that section 33 does not apply to a case like the present, that is, to a suit for redemption, and in support of this he refers to the case of *Nawab Azimut Ali Khan v. Jowahir Sing* (1). His contention is sustained by the view expressed by their Lordships of the Privy Council in that case, as well as by the language of section 33. The language used in section 33 has reference only to cases in which the money is payable by the defendant to the plaintiff and not to a case like the present, in which the reverse is the case. In our judgment the defendants mortgagees are entitled to the full amount of interest due under the mortgage deeds, minus any amount which the Court below finds that they have received and have not accounted for.

This is our answer to the reference. Costs incurred in this Court will be notified to the Court making the reference.

(1) (1870) 13 Moo., I. A., 404, at p. 414.

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