

religious basis; also in view of the fact, which is admitted, that the practice of adoption amongst the Jains is necessarily unlike that observed amongst the Brahmaus and Vaishiyas, as we have already pointed out, it might be thought that the onus of proving the existence of a restriction upon adoption in the case of the Jains such as prevails amongst Hindus proper lay upon the party making this assertion. In view, however, of the ruling of their Lordships of the Privy Council that in Jain cases it rests on the party alleging a custom or practice at variance with that of orthodox Hindus to prove his allegation, we have treated this burden as one which lay upon the defendant appellant. This onus he has, in our judgment, satisfied, and we remain of the opinion which we expressed in *Manohar Lal v. Banarsi Das* that the marriage of a Jain is no bar to his adoption.

We therefore allow the appeal. We set aside the decree of the Court below and give a declaration that Jambu Prasad was adopted by Musammat Asharfi Kunwar and that his adoption is valid, and we dismiss the plaintiff's suit with costs in both Courts.

Appeal decreed.

Before Mr. Justice Aikman and Mr. Justice Karamat Hussain.

RAM DIN (DEFENDANT) v. BHUP SINGH AND OTHERS (PLAINTIFFS)*

Civil Procedure Code, section 43—Usufructuary mortgage—Suit for redemption—Subsequent suit to recover surplus profits—Act No. XV of 1877 (Indian Limitation Act), Schedule II, Article 105—Act No. IV of 1882 (Transfer of Property Act), section 92.

In a suit for redemption of a usufructuary mortgage the mortgagor is bound to claim for surplus profits, if any, payable by the mortgagee. Section 43 of the Code of Civil Procedure is a bar to the recovery of such profits by means of a separate suit.

Article 105 of the second schedule to the Indian Limitation Act, 1877, applies to a case where the mortgagor gets possession otherwise than by means of a suit for redemption.

Vinayak Shivrao Dighe v. Dattaraya Gopal (1), *Rukhminibai v. Venkatesh* (2), *Satyabadi Behara v. Harabati* (3), *Kashi v. Bajrang Prasad* (4) and *Baloji Tamaji Potkar v. Tamangouda* (5) referred to.

* First Appeal No. 30 of 1907, from an order of C. D. Steel, District Judge of Shahjahanpur, dated the 5th of January 1907.

- (1) (1902) I. L. R., 26 Bom., 661. (3) (1907) I. L. R., 34 Calc., 223.
 (2) (1907) I. L. R., 31 Bom., 527. (4) (1907) I. L. R., 30 All., 36.
 (5) (1869) 6 Bom., H. C. Rep., A. C. J., 97.

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THE facts of this case are as follows :—

The plaintiffs were usufructuary mortgagors. They brought a suit for redemption on the ground that the mortgage debt had been satisfied from the profits of the property mortgaged, but in that suit they did not claim any surplus profits. They obtained a decree for redemption on the 13th of May 1906, without payment, on the finding that the mortgage had been satisfied as alleged in 1280 Faslī, and in execution of that decree they got possession of the mortgaged property.

Thereafter the suit out of which this appeal arose was brought by the plaintiffs mortgagors to recover excess profits realized by the defendant after the satisfaction of the mortgage debt and before redemption. The Court of first instance (Subordinate Judge of Shahjahanpur) dismissed the suit, holding that it was barred by the provisions of section 43 of the Code of Civil Procedure. On appeal by the plaintiffs the District Judge held that section 43 was no bar to the suit, and remanded the case under section 562 for trial on the merits. From this order the defendant appealed to the High Court.

Babu *Jogindro Nath Chaudhri*, for the appellant.

The Hon'ble Pandit *Madan Mohan Malaviya*, for the respondents.

AIKMAN, J.—This is an appeal from an order of the learned District Judge of Shahjahanpur remanding a case under the provisions of section 562 of the Code of Civil Procedure.

The plaintiffs, who are respondents here, brought a suit against the appellant in a Munsif's Court for redemption of a usufructuary mortgage. They obtained a decree and were put in possession of the mortgaged property on the 13th of March 1906. They subsequently brought the suit out of which this appeal arises to recover from the appellant Rs. 5,000 on account of surplus collections alleged to have been received since 1874, when the mortgage debt was discharged by the usufruct of the property. The suit was filed in the Court of the Subordinate Judge. It was dismissed by him on the ground that it was barred by the provisions of section 43 of the Code of Civil Procedure. On appeal by the plaintiffs the learned District Judge held that the suit was not barred and remanded it for decision on the merits. It is against

that order of remand that the defendant has preferred this appeal.

In my opinion the appeal must be allowed. The learned District Judge has written a careful judgment, but I cannot agree with the conclusion at which he has arrived. He says:—"The cause of action on the 17th of December 1904, the date of the institution of the case in the Munsif's court, was the retention of the property. The whole claim which the plaintiff was entitled to make then on that cause of action was to say:—"Give me possession of the property'." This is a view which I cannot accept.

The plaintiff had another remedy, which he was not only entitled to sue for but bound to sue for in the previous suit, and that was to have an account taken and a decree passed for any surplus received by the mortgagee after discharge of the mortgage debt. As remarked by Jenkins, C. J., in *Vinayak v. Dattatrayu* (1), "a redemption suit has for its purpose the complete adjustment of the rights of the parties, and the decree when properly framed provides for matters even up to the time when it is ultimately carried into effect."

The decisions in *Rukhminibai v. Venkatesh* (2), *Satyabadi Behara v. Harabati* (3) and *Kashi v. Bojrang Prasad* (4) are also in favour of the appellant, and we have not been referred to any case in which a suit like the present has been held to be maintainable. In the case of *Rukhminibai v. Venkatesh* (2) the subsequent suit of the mortgagee was held to be barred either under section 13 or section 43 of the Code of Civil Procedure. Section 13 will not apply to this case, as the Court which tried the previous suit was not a Court competent to try the present suit; but the provisions of section 43 are sufficient to bar this suit.

The learned District Judge in support of the conclusion to which he came relies on article 105 of the second schedule of the Limitation Act, which prescribes a period of limitation for a suit by a mortgagor after the mortgage has been satisfied to recover surplus collections received by the mortgagee, and gives as the time from which the period begins to run the date when the mortgagor re-enters on the mortgaged property. In my opinion

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(1) (1902) I. L. R., 26 Bom., 661. (3) (1907) I. L. R., 34 Calc., 223.
(2) (1907) I. L. R., 31 Bom., 527. (4) (1907) I. L. R., 30 All., 36.

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this article must not be construed so as to conflict with the provisions of section 43 of the Code of Civil Procedure, and must be deemed to refer to cases in which the mortgagor has got possession of the mortgaged property otherwise than by means of a suit for redemption.

For the above reasons I would allow the appeal with costs.

KARAMAT HUSEIN, J.—The facts which led up to this appeal are that a suit for redemption (No. 591 of 1904) was brought in the Court of the Munsif of Shahjahanpur. The plaintiffs in that suit did not claim any surplus collections made by the mortgagee in possession, nor did they obtain any permission to bring a separate suit for such collections. They got possession of the property in execution of the decree for redemption on the 13th March 1906, without any payment, as it was found that the mortgage debt had been satisfied from the profits of the mortgaged property before 1280 Fasli. On the 1st of May 1906, the plaintiffs brought a suit for the recovery of the excess profits realized by the defendant after the satisfaction of the mortgage money and before redemption. One of the pleas in defence was that section 43 of the Code of Civil Procedure barred the suit. The Court of first instance, accepting the plea, dismissed the suit. On appeal by the plaintiffs the learned District Judge set aside the decree of the first Court and remanded the case under section 562 of the Code of Civil Procedure. The lower appellate Court came to the conclusion that section 43 of the Code of Civil Procedure did not bar the suit and that the cause of action for the surplus arose subsequently to that for redemption and was a distinct cause of action. The defendant has appealed to this Court. It is argued on his behalf that the cause of action for surplus profits in a redemption suit is not separate from the cause of action for the recovery of the possession of the property mortgaged and that the mortgagor in such a suit has only one single cause of action against the mortgagee in possession. This contention, I am of opinion, is perfectly sound. The comprehensive character of suits relating to mortgages and the obligation incumbent on litigants to see that the decree in them covers all rights is well known—*Vinayak v. Dattatraya* (1)—and a

(1) (1902) L. L. R., 26 Bom., 661, at p. 668.

mortgagor in a redemption suit has not only to claim possession, where the mortgagee has it, but he has also to claim surplus collections if any. His cause of action in a redemption suit is a single cause of action, and a demand for the excess collections, if any, forms an essential part of his whole claim in respect of that cause of action, and hence, if the plaintiff in a redemption suit succeeds, the Court has to pass a decree, ordering that an account shall be taken (section 92 of the Transfer of Property Act). Regarding the principle already stated, the learned Judges in the case of *Baloji v. Tamangouda* (1) remark :—“In this case the plaintiff, who claims under the mortgagor, sues to recover over-payments on account of a mortgage which has been redeemed. We are of opinion that the claim which arose out of the cause of action when the suit for redemption was filed was that the plaintiff, the mortgagor, was entitled, first, to recover possession of the mortgaged property on the ground that the mortgage had been satisfied out of the rents and profits received by the mortgagees, and, secondly, to get back any sum overpaid, and that therefore, the first suit should have claimed both possession and the surplus as required by section 7 of the Code of Civil Procedure, which provide that ‘every suit shall include the whole of the claim arising out of the same cause of action.’ The proper decree would have been to order payment of the surplus, on the ground that the mortgagees were trustees of the mortgagor and that the money in their hands belonged to them.”

There in fact may be suits for redemption in which a demand for a surplus directly flowing from a settlement of accounts may be *co-extensive* with the *whole* claim of a mortgagor in respect of his cause of action to redeem. The right to claim the surplus profits is synchronous with the right to claim possession of the mortgaged property, and to hold that the cause of action for claiming excess collections accrues when the mortgage debt has been satisfied is inconsistent with the principles on which the law of redemption is based.

The question of accounts in a redemption suit must not be mixed up with the question of mesne profits in a suit for the recovery of immovable property against a trespasser, for the

(1) (1866) 6 Bom., H. C. Rep., A. C. J., 97, at p. 98.

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position of a mortgagee in possession is very different from that of a trespasser. The possession of the mortgagee before redemption is possession for the mortgagor and he "becomes a trustee for the mortgagor after he has been paid." (Ashburner on Equity, p. 258). He has, therefore, to deliver possession of the mortgaged property and to "account for his gross receipts from the mortgaged property" (section 76 of the Transfer of Property Act). The possession of a trespasser is of an adverse nature and section 44 of the Code of Civil Procedure shows that the cause of action for mesne profits is distinct from that for the recovery of immoveable property. In India "the policy of the law has been to allow a plaintiff to enforce a claim for possession of land and for mesne profits, either in one suit or two as he might think proper, but at the same time to induce him, if there is no reason to the contrary, to dispose of his whole claim in one suit only." *Kishori Lal Roy v. Sharat Chunder Mozumdar* (1) quoted with approval in *Lessor Babui v. Janki Bibi* (2). Such being the distinction between a claim for surplus collections in a redemption suit and a claim for mesne profits in a suit in ejectment, the cases of *Mon Mohun Sirkar v. The Secretary of State for India* (3) and of *Ram Dayal v. Madan Mohan Lal* (4), which deal with the suits for mesne profits, have no bearing upon the case before me.

Maksud Ali v. Nargis Dye (5) and *Amanat Bibi v. Imdad Husain* (6) have also nothing to do with a suit for surplus profits brought after a suit for redemption.

It is contended on behalf of the respondent that article 105 of the Indian Limitation Act (No. XV of 1877) provides three years' limitation for the recovery of surplus collections received by the mortgagee from the date when the mortgagor re-enters on the mortgaged property, and that this indicates that there can be a separate suit for excess collections.

The article in my opinion contemplates a case other than that of redemption. When a mortgagor takes possession of the mortgaged property, not in execution of a decree for redemption, but in some other way, then article 105 applies. In *Baboo Gour*

(1) (1882) I. L. R., 8 Calc., 593.

(4) (1899) I. L. R., 21 All., 425.

(2) (1891) I. L. R., 19 Calc., 615.

(5) (1892) I. L. R., 20 Calc., 322.

(3) (1890) I. L. R., 17 Calc., 968.

(6) (1888) L. R., 15 I. A., 106.

Kishen Singh v. Sahay Fukeer Chund (1) it was ruled that a suit for redemption does not debar the mortgagor from afterwards suing the mortgagee in possession for mesne profits payable between the date of suit and the execution of the decree for redemption. In that case the mortgagor, as has been observed by the learned judges in *Satyabadi Behara v. Harabati* (2), had sued under Regulation I of 1798, while the scheme of the Transfer of Property Act is quite different. For the reasons given above I would allow the appeal.

BY THE COURT.—The order of the Court is that the appeal be allowed. The order of the learned District Judge remanding the case under section 562 of the Code of Civil Procedure is set aside, and the decree of the Court of first instance is restored. The appellant will have his costs here and in the Court below.

Appeal decreed.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

WILAYATI BEGAM (PLAINTIFF) v. NAND KISHORE (DEFENDANT).*

Civil Procedure Code, section 244—Question relating to the execution, discharge or satisfaction of the decree—Contest between the holder of a decree for an undivided share of joint property and an auction purchaser pendente lite.

One Wilayati Begam obtained a decree for possession of a share in certain joint and undivided zamindari property, and this decree was executed so far as might be by delivery of formal possession. While the suit in which this decree was passed was pending, one Raghunath Das obtained a simple money decree against another co-sharer in the zamindari, and in execution thereof brought the property to sale and it was purchased by Nand Kishore. Nand Kishore got possession. Wilayati Begam applied for mutation of names in her favour, but was resisted by Nand Kishore, and accordingly instituted a suit against Nand Kishore praying for a declaration of her title as against him. *Held* that such a suit was not obnoxious to the prohibition contained in section 244 of the Code of Civil Procedure. *Gulzari Lal v. Madho Ram* (3) distinguished. *Jagan Nath v. Milap Chand* (4) and *Kino v. Rudkin* (5) referred to.

* Appeal No. 53 of 1907 under section 10 of the Letters Patent.

- (1) (1867) 7 W. R., 364. (3) (1904) I. L. R., 26 All., 447.
 (2) (1907) I. L. R., 34 Calc., 223. (4) (1906) I. L. R., 28 All., 723.
 (5) (1877) L. R., 6 Ch. D., 160.

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