

by soldering. In my opinion, therefore, it is impossible to hold that the conviction of the accused persons under section 251 of the Indian Penal Code was in any way illegal or improper.

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*Application dismissed.*

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## APPELLATE CIVIL.

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*Before Sir Grimwood Mears, Knight, Chief Justice, and  
 Mr. Justice Lindsay.*

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 1926  
 March,  
 30.
 

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GOKUL KALWAR (DEFENDANT) *v.* CHANDAR SEKHAR  
 AND OTHERS (PLAINTIFFS) AND MAHADEO KALWAR  
 (DEFENDANT).\*

*Act No. IV of 1882 (Transfer of Property Act), section 83—  
 Invalid deposit—Deposit made when one of the mort-  
 gagees is a minor and not represented by a guardian ad  
 litem—Mesne profits—Mortgage redeemable only in  
 fallow season—Preliminary and final decrees—Appeal.*

*Held* that a deposit of mortgage money purporting to be made under section 83 of the Transfer of Property Act, 1882, is not a valid deposit if at the time it is made one of the mortgagees, being a minor, is not represented by a properly constituted guardian *ad litem*. *Kannu Mal v. Inārdarpal Singh* (1), followed.

*Held* also that in the case of a usufructuary mortgage redeemable during the fallow season it is for the mortgagor to do everything that is necessary to enable the mortgagee to vacate possession during that particular season. If this is not done, the mortgagee is entitled to remain in possession until the next fallow season, and, being thus lawfully in possession, is not liable for mesne profits.

*Held* further that where, pending an appeal from the preliminary decree in a mortgage suit, a final decree is passed and an appeal from that decree is dismissed for want of prosecution, it is still open to the Court to proceed with the appeal against the preliminary decree. *Kanhaiya Lal v. Tirbeni Sahai* (2), followed.

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\* First Appeal No. 450 of 1922, from a decree of Charu Deb Banerji, Subordinate Judge of Gorakhpur, dated the 5th of October, 1922.

(1) (1922) I.L.R., 45 All., 273.

(2) (1914) I.L.R., 36 All., 532.

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THE facts of this case are fully stated in the judgement of the Court.

Munshi *Shiva Prasad Sinha*, for the appellant.

Mr. *B. E. O'Connor* and Mr. *Sankar Saran*, for the respondents.

MEARS, C. J. and LINDSAY, J.—This appeal is directed against a preliminary decree passed in the court of the Subordinate Judge of Gorakhpur in a suit for redemption. The plaint is dated the 15th of September, 1916, and the suit was suit No. 7 of 1917. It seems that the suit was dismissed originally in the court of first instance. There was an appeal to this Court and the case was sent back for disposal on the merits, and finally the Subordinate Judge gave judgement on the 5th of October, 1922, allowing redemption.

In framing their suit for redemption the plaintiffs mortgagors asked for mesne profits for two periods :

(1) from the date of a certain deposit which they had made in court under section 83 of the Transfer of Property Act till the date of the suit; and

(2) from the date of the suit till the date of delivery of possession.

The Subordinate Judge was of opinion that the plaintiffs were not entitled to mesne profits for the first period and he based his decision on the ground that the deposit which the plaintiffs had made was not a proper deposit. At the time that deposit was made one of the mortgagees was a minor, and when the plaintiffs lodged the money in court there was no properly constituted guardian *ad litem* of this mortgagee defendant. The learned Subordinate Judge, therefore, held that this was not a good deposit so

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as to stop the running of interest and he relied for his decision upon a judgement of this Court in *Kannu Mal v. Indarpal Singh* (1). That case afterwards came up before a Bench in Letters Patent (2), in which the law was affirmed as followed by the learned Subordinate Judge. It must be taken, therefore, that there was, before the date on which the suit was brought, no valid deposit of the mortgage money under section 83 of the Transfer of Property Act.

We are, however, unable to understand why after coming to this finding, the learned Subordinate Judge allowed mesne profits to the plaintiffs from the date of the suit till the date of delivery of possession.

The judgement of the Subordinate Judge was delivered on the 5th of October, 1922, and by the decree, which was prepared on the 13th of October, 1922, the defendants mortgagees were ordered to vacate possession in favour of the plaintiffs on or before the 5th of March, 1923. As a matter of fact, the plaintiffs got possession either on the 26th or 28th of October, 1922. The question is whether the Subordinate Judge was justified, in this preliminary decree, in giving a direction that the plaintiffs should receive mesne profits from the date of the suit till the date of delivery of possession. If the defendants mortgagees could not be said to have had wrongful possession during this latter period, they were certainly not liable to pay mesne profits to the plaintiffs.

This question, as to whether the defendants were in wrongful possession or not, must be determined on the terms of the mortgage in their favour. It is clear that this mortgage was one of those possessory mortgages in which the defendants were only liable to surrender possession if everything was done by the

(1) (1921) I.L.R., 44 All., 102.

(2) (1922) I.L.R., 45 All., 273.

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mortgagors to discharge the mortgage debt by Jeth Sudi Puranmashi. In a mortgage of this kind the mortgagee can only be called upon to vacate possession in favour of the mortgagors if all steps necessary to redemption have been taken so as to enable the mortgagee to vacate possession in the fallow season of Jeth. It follows, therefore, that if in one particular year the mortgagors fail to take all the necessary steps to obtain redemption in the fallow season, the mortgagee is entitled, under the terms of the mortgage, to remain in possession till the fallow season of the following year, and it could not, therefore, be said that where the plaintiffs have made default in taking proceedings for redemption in one year the mortgagee is, for the year which follows, in wrongful possession. On the contrary, he is in possession in strict accordance with the terms of the mortgage contract.

And so in the present case we are unable to see how it can be said that these mortgagees were in wrongful possession from the date of the suit up till the date of delivery of possession. Before the suit was brought no proper and effective steps had been taken by the mortgagors to obtain redemption in the fallow season of Jeth. We are, therefore, of opinion that the direction in the preliminary decree, awarding mesne profits from the date of the suit till the date of delivery of possession, was erroneous.

It now appears that, since the passing of this preliminary decree in the court below and since the date of the filing of this appeal (No. 450 of 1922) a final decree was prepared in the court of the Subordinate Judge of Gorakhpur. This was drawn up on the 28th of April, 1924. The Subordinate Judge by that final decree awarded a sum of Rs. 8,000 odd by way of mesne profits to the plaintiffs. Against this final

decree the present defendant appellant, Gokul Kalwar, filed a First Appeal, No. 103 of 1925, objecting to the award of these mesne profits. That appeal, however, was dismissed several months ago for want of prosecution, the reason being that the appellant had failed to deposit the necessary translation and printing charges.

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It was suggested before us that the result of the dismissal of the plaintiffs' appeal, F. A. No. 103 of 1925, was that we were not at liberty any longer to deal with this appeal (No. 450 of 1922) directed against the preliminary decree. It was argued that the final decree in the mortgage suit had become final as between the parties and that we are not now in a position to pass any decree which would be inconsistent with that final decree. We think, however, this argument must be rejected in view of the ruling of the Full Bench of this Court in *Kanhaiya Lal v. Tirbeni Sahai* (1).

The result of all this is that we hold that the preliminary decree was wrong in allowing mesne profits from the date of suit till the date of delivery of possession and we vary that preliminary decree accordingly.

*Appeal allowed.*