

*Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.*

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**RAMESHAR SINGH (DEFENDANT) v. KANAHA SAHU (PLAINTIFF).\***

*Conditional sale—Interest—Mesne profits—Foreclosure—Regulation XVII of 1806, s. 7.*

A deed of conditional sale, after reciting that the vendor had received the sale-consideration (Rs. 199), and had put the vendee in such possession of the property as the vendor himself had, proceeded as follows:—"I (vendor) shall not claim mesne profits, nor shall the vendee claim interest: in case the vendee does not obtain possession, he shall recover mesne profits for the period he is out of possession: and when, after the expiry of the term fixed, I repay the entire sale-consideration in a lump sum, I shall get my share redeemed: in case of default in payment of the sale-consideration, the sale shall be deemed to become absolute". The vendee did not get possession of the property for some years, and, on the expiry of the term, took proceedings under Regulation XVII of 1806 to foreclose. The legal representative of the vendor deposited the sale-consideration mentioned in the deed of conditional sale (Rs. 199) within the year of grace. In a suit by the vendee for possession of the property, the sale having been declared absolute, the question arose whether or not the legal representative of the vendor should have deposited, by way of interest, in order to prevent the sale from becoming absolute, in addition to the sale-consideration, the amount of mesne profits for the period the vendee was out of possession of the property. *Held* (SPANKIE, J., dissenting), on the construction of the deed of conditional sale, that the deposit of the sale-consideration (Rs. 199) was sufficient for the redemption of the property.

THE plaintiff in this suit claimed possession of a certain share in a certain village, by virtue of a conditional sale of such share which had been declared foreclosed. The instrument by which this conditional sale was made, dated the 1st December, 1868, provided that possession of such share should be given to the conditional vendee, the plaintiff, for a term of six years, and contained the following stipulation:—"I (the conditional vendor) shall not claim mesne profits, nor shall the vendee claim interest: in case the vendee does not obtain possession, he shall receive mesne profits for such time as he may be out of possession: when on the expiration of the term I repay the entire sale-consideration in a lump sum, I shall get my share redeemed: in case of default in payment of the sale-consideration, the sale shall be deemed to become absolute." The defendants were the legal representatives

\* Appeal under s. 10, Letters Patent, No. 1 of 1881.

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of the conditional vendor. Of them Rameshar Singh alone contested the suit. He contended that, as he had deposited the entire sale-consideration and the costs of the foreclosure proceedings, within the year of grace, the sale had been improperly declared foreclosed. It appeared that the conditional vendor had not given the plaintiff possession of the property, but had retained possession of it; and that it was only when the conditional vendor made the property over to a third party that the plaintiff acquired possession of it by right of pre-emption. With reference to the fact that he had been kept out of possession of the property for some years, the plaintiff contended that, inasmuch as the conditional vendor had not placed him in possession of the property, in accordance with the terms of the conditional sale, but had retained possession thereof himself, the defendant should have deposited the mesne profits of the share for such period as the plaintiff was not in possession, in addition to the amount of the sale-consideration and the costs of the foreclosure proceedings, and, having failed to do so, the mortgage had been properly declared foreclosed. The Court of first instance framed the following issues upon this point, *viz.*, "What sum was it necessary to pay in the foreclosure case, and in default of payment of that sum, did the foreclosure alleged by the plaintiff rightly take place." The Court of first instance held upon this issue that, with reference to the terms of the conditional sale, all that the defendant was bound to deposit was the sale-consideration, and that he was not bound to deposit mesne profits, and that as the sale-consideration had been deposited with time, the property must be regarded as redeemed; and it dismissed the plaintiff's suit. On appeal by the plaintiff the lower appellate Court held that it was incumbent on the defendant to have deposited the mesne profits of the property, and that, as he had failed to do so, the sale had become absolute; and it gave the plaintiff a decree for possession of the property. The defendant appealed to the High Court, contending that, under the terms of the conditional sale, it was not incumbent on him to have deposited the mesne profits in order to prevent foreclosure. The appeal came for hearing before Pearson, J., and Spankie, J., who differed in opinion on the question whether, under the terms of the deed, mesne profits should have been deposited in order to save fore-

closure. The following judgments were delivered by those learned Judges :

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PEARSON, J.—The question which we are called to determine in appeal is that upon which the lower Courts have differed in opinion, *viz.*, whether the plaintiff was entitled to payment of the mesne profits due to him in lieu of interest as a condition of the redemption of the estate, the subject of the conditional sale, in addition to the amount of the sale-consideration. That question must, I conceive, be determined strictly in reference to the terms of the deed of conditional sale, and must therefore be determined in the negative. For the terms of that deed are that “when, after the fixed period, I repay the entire sale-consideration in a lump sum, I shall get my share redeemed, and, in case of default of payment of the sale-consideration, the sale shall be held to become absolute.” Such being the terms of the contract, the plaintiff in seeking to foreclose his mortgage was not warranted in demanding, nor was the defendant, appellant here, bound to pay, more than the amount of the sale or mortgage consideration. That amount was tendered by him, and should have been accepted by the plaintiff, whose present suit was accordingly, in my judgment, rightly declared by the Court of first instance to be unmaintainable and was dismissed. At the time of the execution of the deed aforesaid in the plaintiff’s favour, it was apparently intended that he should take possession of the property to which it refers and himself realize the mesne profits in lieu of interest on the sale or mortgage consideration; but it was provided in the deed that, should he not have possession, he should receive the mesne profits of the period of non-possession. To those profits he was doubtless entitled; but it does not follow that he could lawfully claim them in addition to the aforesaid consideration as a part of the condition of redemption of the property. What was contemplated was presumably that they should be realized by him or paid to him year by year. It seems that, as a matter of fact, the executant of the deed retained possession of the property until 1874, when he made it over to a party from whom the appellant before us acquired it by right of pre-emption. How far he is liable for the mesne profits in question we are not now required to determine. I would allow the appeal with costs, and

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reversing the lower appellate Court's decree, would restore that of the Court of first instance.

SPANKIE, J.—In dealing with this case I desire to confine myself strictly to the question that arises in the pleas relied on in appeal as to the misconstruction of the terms of the deed of conditional sale, the basis of this suit, by the lower appellate Court. By the terms of the deed the mortgagor agrees to put the mortgagee in possession of the property mortgaged. The one is not to claim mesne profits (*wásilát*) and the other is not to claim interest (*sud*), and after the period fixed for repayment of the loan the mortgagor is at liberty to redeem on deposit of the whole and entire sale-consideration in a lump sum. Were there no other conditions than these in the deed of conditional sale, the transaction would then assume the character of an usufructuary mortgage, the profits being enjoyed by the mortgagee in lieu of interest, and the mortgagee not being liable to any account, and being entitled to redeem the property on payment of the principal sum borrowed, when the term fixed in the deed had expired. The mortgagor would have been bound to give possession to the mortgagee, and if he refused to do so, or was unable to do so, the mortgagee might sue him at once for the recovery of his money or for possession. But there is another condition of the deed, which runs thus, that "in case of (the mortgagee's) not obtaining possession (*adam dakhál yábt*), he shall receive "*wásilát*" for the period during which he was out of possession". On the assumption that the *wásilát* or profits were to be enjoyed as interest, the mortgagee, not obtaining possession, was not under any obligation either to sue for possession or to bring a suit at once for the recovery of his money. He was at liberty to wait until the term of the mortgage had expired. The plaintiff-respondent, relying on the terms of the deed, claims mesne profits as *interest* during the period he remained out of possession. The first Court holds that the plaintiff is not entitled to demand the sum claimed along with the principal of the loan before redemption can be had. But the second Court in appeal has taken a different view, holding that it was intended by the terms of the deed that, if the mortgagee did not obtain possession, he was entitled to the mesne profits in lieu of

interest, and that he was entitled to the sum as claimed. I am disposed to accept the finding of the lower appellate Court as being good in law and also equitable. It seems to me that, when the mortgagee found himself in the position provided for in the deed, that is to say, when he did not obtain possession, the character of the mortgage transaction was changed. One condition provided for the possession of the mortgagee and his enjoyment of the profits in lieu of interest,—“I shall not claim the mesne profits (*wásildát*) and the vendee shall not claim interest (*súid*).” The other condition provided for the payment of interest to the mortgagee, should possession not be taken. The profits (*wásildát*) are to be enjoyed by the mortgagee during the period of his being out of possession. The mesne profits by the terms of the deed were to be regarded as interest if the mortgagee took possession, and it is difficult to understand how, upon the face of the bond, they should be looked upon in any other light, in the event of the mortgagee remaining out of possession, a possibility contemplated by the parties and arranged for by the contract. S. 7, Regulation XVII of 1806, applies to cases in which the mortgagee is in possession, and to cases in which the mortgagor has himself retained possession, and the provision respecting the latter case is that the payment or tender of the principal sum lent, with any interest due thereupon, shall entitle the mortgagor to redeem his property. The terms of the contract show that the possibility of the mortgagee not obtaining possession was foreseen, and it was provided for. If it was intended that he was to receive profits as interest, it cannot be said that there is any difficulty about the rate of that interest. The mesne profits are the measure of the interest. As the sale-consideration was Rs. 199, and the profits are found to be Rs. 39-11-5½ per annum, the interest was not by any means excessive, the mortgage having been made for six years. Again, I do not consider that it was necessary for the mortgagee to realize the profits, intended to be interest, yearly, as they fell due. Regarding the profits as interest, he was at liberty to wait until the term of the mortgage had expired, when he could foreclose. Then if the mortgagor was anxious to redeem at any time before foreclosure, he was I think bound to tender the principal sum with any interest due thereon. The memorandum of appeal does not disclose any

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further objections. I would therefore dismiss the appeal and affirm the decree of the lower appellate Court with costs.

The defendant appealed to the Full Court from the judgment of Spankie, J., under s. 10 of the Letters Patent.

The *Senior Government Pleader* (Lala Juala Prasad) and *Munshi Kashi Prasad*, for the appellant.

*Munshi Hanuman Prasad*, for the respondent.

The following judgments were delivered by the Full Court :—

OLDFIELD, J., (STUART, C. J., and STRAIGHT, J., concurring).—  
A mortgage with conditional sale was made of the property in suit by Nawaz Singh, now represented by the defendant-appellant, to the plaintiff-respondent. The deed, after reciting that the executant sells the property for Rs. 199, proceeds: "Having received the whole consideration mentioned in the deed, I put the vendor in possession and enjoyment of the thing sold in every way like myself: I shall not claim mesne profits nor shall the vendee claim interest: in case the vendee does not obtain possession, he shall recover mesne profits for the period he is out of possession, and when, after the expiry of the term fixed, I repay the whole consideration in a lump sum, I shall get my share redeemed, and in case of default of payment of the sale-consideration the sale shall become absolute." The respondent who did not get possession took proceedings to foreclose on expiry of the term, and the appellant deposited the sum of Rs. 199, the consideration mentioned in the deed, within the year of grace, and the only question we are concerned with in appeal is whether the appellant was bound, in order to prevent the sale becoming absolute, to have deposited, besides the sum of Rs. 199, the amount of mesne profits due for the period the respondent was out of possession of the property. In our opinion the deposit was sufficient for the redemption of the property with reference to the contract entered into between the parties. It will be seen from the terms of the deed above quoted that there was to be no claim for interest, and that it was stipulated that the mortgagor might redeem on payment of the sale-consideration, which was the sum of Rs. 199. The mortgagee was entitled to the mesne profits in lieu of any stipulated

sum by way of interest, and he could recover those profits by taking possession of the property or suing for their recovery, as they fell due, but it was not intended that payment of them should be a condition precedent to redemption. Regulation XVII. of 1806, s. 7, directs that, when the mortgagee has not possession of the property, the mortgagor must deposit, in order to redeem the property, the principal sum lent with any interest due thereon. It may be questioned if the mesne profits which the mortgagee agreed to receive in lieu of interest can be considered to be properly interest within the meaning of the Regulation. There is nothing certain or final as to the amount, and one of the objects of the Regulations is to make as definite and precise as possible the amount which the mortgagor has to deposit, since any mistake as to the exact amount entails forfeiture of the property. The case of *Rama Singh v. Munnoo Lal* (1) is in point. We would decree the appeal with costs and make a decree in the terms proposed by Mr. Justice Pearson in his judgment dated the 24th November, 1880.

PEARSON, J.—I have little, if any thing, to add to what I have already said in my judgment of the 24th November last, except that on reconsideration, after hearing arguments on both sides before the Full Bench, I adhere to the opinion therein expressed. By the terms of the deed of conditional sale it is expressly declared that the purchaser shall not be entitled to interest. The provision that, in the event of his not obtaining possession, he shall receive the mesne profits of the period during which he may be out of possession, did not entitle him under Regulation XVII. of 1806 to claim and receive, or bind the defendant-appellant to tender, along with the amount of the sale-consideration, any further sum that might be due to the plaintiff on account of mesne profits, in the foreclosure department, merely on the ground that presumably the mesne profits of the mortgaged property were assigned in lieu of interest on the mortgage consideration pending the mortgage-tenure. Mesne profits do not become interest because they are taken instead of interest. The substitute or equivalent for a thing is something distinct from that thing and not identical with it. No interest whatever was due under the deed in the present case, and

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therefore the provisions of the Regulation above-mentioned relative to the payment of interest are inapplicable.

SPANKIE, J.—I adhere to the view of the case expressed by me in my judgment of the 24th November, 1880.

*Appeal allowed.*

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*Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.*

LALJI MAL AND ANOTHER (PLAINTIFFS) v. HULASI AND ANOTHER (DEFENDANTS).\*

*Suit for recovery of Immoveable property—Mesne profits—Relinquishment of part of claim—Act X of 1877 (Civil Procedure Code), s. 43, 44—Mortgage—Specific performance of contract—Compensation.*

According to the terms of a mortgage possession of the mortgaged property was to be delivered to the mortgagee, and he was to take the mesne profits. The mortgagor refused to deliver possession of the property, and the mortgagee sued him to enforce specific performance of the contract to deliver possession, and obtained a decree. At the time this suit was brought, the mortgagee had been kept out of possession of the property for two years, during which time the mortgagor had taken the mesne profits. The mortgagee subsequently sued the mortgagor to recover the mesne profits of the mortgaged property for those two years. *Held* that, as the mortgagee might in the former suit, in addition to seeking the specific performance of the mortgage-contract, have asked for such mesne profits by way of compensation for the breach of it, and as the claim for possession and mesne profits were in respect of the same cause of action, *viz.*, the breach of the contract to give possession, the second suit was barred by the provisions of s. 43 of Act X of 1877.

THIS was an application to the High Court by the plaintiffs in this suit to revise the appellate decree therein of Mr. R. G. Currie, Judge of Aligarh, dated the 25th March, 1880. It appeared that the defendants had mortgaged a certain estate to the plaintiffs, promising to place them in possession thereof. They failed to perform this promise, and consequently the plaintiffs had instituted a suit against them on the 24th August, 1878, claiming possession as mortgagees of such estate. The plaintiffs obtained a decree in that suit on the 31st January, 1879. The plaintiffs subsequently instituted the present suit against the defendants, in which they

\* Application, No. 51B. of 1880, for revision under s. 622 of Act X. of 1877 of a decree of R. G. Currie, Esq., Judge of Aligarh, dated the 25th March, 1880, modifying a decree of Munshi Shankar Lal, Munsif of Khair, dated the 16th December, 1879.