

## APPELLATE CIVIL.

Before Mr. Justice Wazir Hasan and Mr. Justice  
Gokaran Nath Misra.

1927  
August, 4.

SHHO SHANKAR PANDIE AND ANOTHER (DEPENDANTS-  
APPELLANTS) v. RAJ JAS LAL (PLAINTIFF-RESPON-  
DENT.)\*

*Usufructuary mortgage—Redemption—Mortgagee getting possession over major portion of mortgaged property and taking no steps to recover possession of undelivered portion—Acquiescence in the possession of portion—Plea of loss of interest, whether maintainable in suit for redemption.*

Where a mortgagee gets possession over the major portion of the property mortgaged and does not succeed in getting possession over a smaller portion of the said property and chooses not to take any further remedy for recovery of possession of the portion of the property for which possession has not been delivered to him, *held* that he must be deemed to have acquiesced in the possession of a portion and at the time of redemption he should not be heard in support of his claim as to loss of interest on that account. [*Partab Bahadur Singh v. Gajadhar Bakhsh Singh* (1), and *Dubri v. Ram Naresh Singh* (2), followed.]

Mr. H. D. Chandra, for the appellants.

Messrs. Niamat-ullah and Ganesh Prasad, for the respondent.

HASAN and MISRA, JJ. :—This is an appeal in a redemption suit. Certain plots of under-proprietary holding, together with groves, were mortgaged under a deed, dated the 11th of February, 1909, for a sum of Rs. 800. The possession of the property mortgaged was to be taken by the mortgagee in lieu of the interest on Rs. 600, and the remaining sum of Rs. 200 was to bear an interest at 6 per cent. compoundable at yearly rests.

\*Second Civil Appeal No. 14 of 1927, against the decree, dated the 30th of September, 1926, of E. M. Nanavutty, District Judge of Fyzabad, modifying the decree, dated the 13th of July, 1926, of Hari Shankar Chaturvedi, Munsif of Haveli, Fyzabad, decreeing the suit.

(1) (1902) I.L.R., 24 All., 521.

(2) (1926) 3 O.W.N., 176.

Another deed of further charge is alleged to have been executed on the same date on the security of the same property for a sum of Rs. 200 carrying interest at 25 per cent. per annum simple interest. The heirs of the original mortgagor sold their equity of redemption to one Bhairon Singh and the present plaintiff obtained a decree for redemption against him. The plaintiff, therefore, claims a decree for redemption against the mortgagees. In his plaint he offered to pay Rs. 800, but claimed a deduction on account of two items, one relating to the prices of twenty trees, alleged by him to have been cut off by the mortgagees and Rs. 40 on account of the price received by them regarding the share of one Ram Kuber Singh. The plaintiff also denied the deed of further charge and contended that nothing should be paid by him on account of that deed.

The defendant-mortgagees claimed money on the principal deed as well as on the deed of further charge and also certain sums of money on account of loss incurred by them in respect of a certain portion of the mortgaged property, for which possession had not been delivered to them by the mortgagors.

The learned Munsif of Haveli of Fyzabad, who tried the case, decreed the plaintiff's suit for redemption on payment of Rs. 800 and interest on the sum of Rs. 200 forming part of the consideration of the said deed. He also held the deed of further charge to have been proved as a valid deed and ordered the plaintiff to pay the money due under the said deed. He disallowed the claim of the plaintiff for deduction on account of the prices of the trees cut and also the claim of the defendants on account of the loss incurred by them on account of their not having obtained possession over the part of the property mortgaged.

The learned District Judge of Fyzabad on appeal modified the said decree and decreed redemption only

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on payment of Rs. 800, the consideration under the principal mortgage-deed, together with interest on the sum of Rs. 200 forming part of the said consideration. The learned District Judge held that the deed of further charge set up by the defendants was not a genuine document and, in his opinion, it was not established that any consideration passed under the said deed. He also held that the said deed did not create any charge on the property but contained merely a personal covenant on the part of mortgagors to pay the money under the said deed, and the plaintiff being merely a transferee of the equity of redemption and not the original mortgagors, could not be asked to pay the money due under the said deed. On these findings the learned District Judge allowed the plaintiff to redeem on payment of Rs. 800 *plus* interest on the sum of Rs. 200 forming part of the said consideration. He accepted the appeal of the plaintiff so far as the money payable under the deed of further charge was concerned. Regarding the costs the learned District Judge ordered in his judgment that the parties will pay and receive costs in proportion to their failure and success.

In appeal it is contended on behalf of the defendants mortgagees that their claim on account of the deed of further charge, dated the 11th of February, 1909, should be allowed and that the learned District Judge's finding regarding the consideration and validity of the said deed should not be accepted. It was also contended in appeal that the plaintiff should have been ordered to pay to the defendants for the loss incurred by them on account of the non-delivery of possession by mortgagors over a portion of the property mortgaged.

As to the first contention we regret we are unable to accept the argument of the learned Pleader for the appellants. The learned District Judge has found, as a matter of fact, that no consideration passed under the

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deed of further charge and has given very good reasons for the said finding. Sitting as a court of second appeal we regret we cannot interfere with the said finding, the finding being one of fact and, as such, binding on us and nothing has been shown which would induce us to set aside that finding.

Regarding the second point we are of opinion that it is a settled rule of law that if the mortgagee gets possession over the major portion of the property mortgaged and does not succeed in getting possession over a smaller portion of the said property and chooses not to take any further remedy for recovery of possession of the portion of the property, for which possession has not been delivered to him, he must be deemed to have acquiesced in the possession of a portion and at the time of the redemption he should not be heard in support of his claim as to loss of interest on that account. This principle has been laid down by their Lordships of the Privy Council in *Partab Bahadur Singh v. Gajadhar Bakhsh Singh* (1). This rule has been consistently followed in this province. We only refer to a recent decision of one of us reported in *Dubri v. Ram Naresh Singh* (2). No other point was urged before us by the learned Pleader for the appellants at the time of the hearing of the appeal.

We are, therefore, of opinion that there is no force in the defendants' appeal and we hereby dismiss it with costs.

The plaintiff-respondent has filed cross-objections and his learned Advocate has argued only on the question of costs, not having urged any other point. It is contended by the learned Advocate for the plaintiff that the learned Judge meant to award to his client costs of both the courts and the decree is wrong, because it awards to the plaintiff only costs of the appellate court

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in accordance with failure and success. In our opinion the interpretation by the learned Advocate for the plaintiff-respondent seems to be a correct one, but we would prefer his taking this matter to the learned District Judge, who can himself interpret his own judgment better than ourselves.

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The appeal fails and is dismissed with costs. The cross-objections are also dismissed but without any costs.

*Appeal dismissed.*

## APPELLATE CRIMINAL

*Before Mr. Justice Wazir Hasan and Mr. Justice  
A. G. P. Pullan.*

1927  
August, 5.

KAMIKHA PRASAD AND ANOTHER (APPELLANTS) v.  
KING-EMPEROR (COMPLAINANT-RESPONDENT).\*

*Criminal Procedure Code (Act V of 1898), section 439—Revision against order of acquittal—High Court's power to entertain revision—Acquittal by Judge in agreement with assessors—Re-trial, when warranted—Indian Penal Code (Act XLV of 1860), sections 300, 301 and 302—Offence of murder—Sessions Judge holding it to be culpable homicide—Reasons given not in accordance with sections 300 and 301—Case, whether falls within section 302.*

The High Court, no doubt, has jurisdiction under section 439 of the Code of Criminal Procedure to entertain an application in revision of an order of acquittal when the Crown has preferred no appeal. But the High Court would not move in such a case unless there was some glaring defect either in the procedure or in the view of the evidence taken by the court below.

If a man against whom there is a certain amount of evidence is acquitted by the Judge who agrees with all the assessors and there is no irregularity in the trial and there is admittedly much false evidence produced on behalf of the

\*Criminal Appeal No. 321 of 1927, against the order, dated the 7th of May, 1927, of Shankar Dayal, First Additional Sessions Judge, at Barabanki, convicting the appellants under sections 147 and 304 of the Indian Penal Code.