

Musammat Sankathia herself in the witness box and the strictures passed by the learned Sessions Judge upon her immediately after he recorded her deposition tend further to increase my doubts as to the truth of the story told by the prosecution witnesses.

For the reasons given above I allow this appeal, set aside the conviction and sentence passed upon the appellant Ram Kumar, acquite him of the offence charged and order his immediate release.

As the appeal has been allowed it is not necessary for me to pass any order upon the criminal reference made by the learned Sessions Judge himself recommending that the sentence of whipping be set aside on the ground that it was in contravention of the provisions of section 393 of the Code of Criminal Procedure. Let the record be returned.

Appeal allowed.

APPELLATE CIVIL

*Before Mr. Justice Bisheshwar Nath Srivastava, Chief Judge
and Mr. Justice Ziaul Hasan*

HAKIM SYED AZIZUDDIN (PLAINTIFF-APPELLANT) v. MUSAMMAT ARFA BEGAM (DEFENDANT-RESPONDENT)*

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Mortgage—Mesne profits—Mortgage deed providing for redemption on payment of entire mortgage money—Mortgagee delivering possession to mortgagor on payment of portion only and agreeing to payment of balance subsequently—Mortgagee, if entitled to mesne profits after delivery of possession—Evidence Act (I of 1872), section 92—Transfer of Property Act (IV of 1882), section 3—Notice—Section 3 of Transfer of Property Act, whether has retrospective effect.

Where a mortgage-deed provides that redemption would be effected on payment of the "entire mortgage money" by the mortgagor, but the mortgagee makes over possession of the

*Second Civil Appeal No. 366 of 1934, against the decree of Mr. Raghubar Daval, I.C.S., District Judge of Unao, dated the 7th of September, 1934, modifying the decree of Pandit Krishna Nand Pande, Additional Civil Judge of Unao, dated the 9th of December, 1933.

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mortgaged property to the mortgagor on payment of portion of the mortgage money and agrees to the balance being paid to him later, the mortgagee is not entitled to recover mesne profits of the property from the date of handing over possession of the mortgaged property.

Though a subsequent oral agreement that the mortgagee would deliver possession of the property to the mortgagor, on payment of a portion only of the mortgage money, is inadmissible under section 92 of the Evidence Act, but the court is not precluded from coming to a finding on the question of fact whether the mortgagor's possession of the property is unlawful or by consent of parties.

The Explanation to the definition of notice in section 3, Transfer of Property Act, does not affect the terms or incidents of transfers made before the 1st of April, 1930, as that section has not been given retrospective effect.

Messrs. *Ghulam Hasan* and *Ali Hasan*, for the appellant.

Messrs. *Hyder Husain* and *H. H. Zaidi*, for the respondent.

SRIVASTAVA, C.J. and ZIAUL HASAN, J.:—This second appeal against a decree of the learned District Judge of Unao arises out of a suit brought by a mortgagee for recovery of the unpaid portion of the mortgage money and mesne profits on the ground that he was unlawfully dispossessed of the mortgaged property.

On the 10th of August, 1909, Mohiuddin Hasan, father of the defendant-respondent, Musammat Arfa Begam, mortgaged a grove with possession to the plaintiff-appellant and his brother Ahmad Mehdi in lieu of a sum of Rs.5,500. The mortgage was for a term of ten years. One of the terms of the mortgage deed was that if the mortgagor should at any time pay a sum of Rs.500 or upwards to the mortgagees, the latter would have to accept it and credit it to the mortgagor. On the 9th of February, 1926, a sum of Rs.5,000 was admittedly paid to the mortgagees by the mortgagor. On the 7th of August, 1929, Ahmad Mehdi, the brother of the appellant, transferred his share of what remained to be recovered by the

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mortgagees from the mortgagor to the appellant and on the 21st of September, 1929, the mortgagor gifted the mortgaged property to the defendant-respondent.

On the 26th of April, 1933, Syed Azizuddin, appellant, brought the present suit for recovery of Rs.1,600 as mesne profits for the alleged wrongful dispossession by the mortgagor and Rs.500 balance of the mortgage money.

The defence was that at the time of the payment of Rs.5,000 to the mortgagees, it was settled that the mortgagees would deliver possession of the property to the mortgagor immediately and that the balance of Rs.500 would be paid to them later. The defendant also pleaded that out of the balance of Rs.500 she had paid Rs.250 to Ahmad Mehdi about his share.

The trial court, the learned Additional Civil Judge of Unao, upheld the defendant's pleas and gave the plaintiff-appellant a decree for only Rs.250, the balance remaining due out of the mortgage money, with proportionate costs. The plaintiff appealed to the District Judge who allowed the appeal and modified the decree of the trial court to this extent that in addition to Rs.250 already decreed in the plaintiff's favour he gave him a further decree for Rs.109-1-6 about mesne profits, proportionate to the mortgage money remaining due. The plaintiff has again appealed and the defendant has filed a cross-objection. The appellant wants his entire claim to be decreed and the respondent's plea is that the lower appellate court was wrong in awarding any mesne profits at all to the appellant.

The first question before us is whether the plaintiff-appellant is entitled to the entire profits of the mortgaged property from the date of the payment of Rs.5,000 to him or to any portion of those profits. Reliance is placed by the learned counsel for the appellant on the terms of the mortgage-deed in question which provides that redemption would be effected on

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payment of the "entire mortgage money" by the mortgagor and the argument is that a portion of the mortgage money remaining due the mortgagor was not entitled to possession of the property. The real question is whether the mortgagor took possession of the property unlawfully or with the consent of the mortgagees. The learned trial Judge has come to the finding that the plaintiff's allegation that the mortgagor took unlawful possession of the property is not true and that it was the mortgagees themselves who made over possession to him. This finding has not been reversed or dissented from by the lower appellate court. No doubt the learned District Judge disregarded the oral agreement set up by the defendant on the ground that it was inadmissible under section 92 of the Indian Evidence Act, but though the evidence of the agreement itself be so inadmissible, we see no reason to hold that the court is precluded from coming to a finding on the question of fact whether the mortgagor's possession of the property was unlawful or by consent of parties and we are of opinion that the learned trial Judge has come to the finding referred to above on very good grounds. It was conceded that if we should uphold the finding of the trial Judge, the appellant would not be entitled to any mesne profits of the property. We hold therefore that the appellant cannot recover the mesne profits claimed by him.

The finding that the defendant paid Rs.250 to Ahmad Mehdi is not challenged but it is argued that the payment cannot be taken into account or held to be *bona fide*. Reliance is placed on the explanation to the definition of "notice" in section 3 of the Transfer of Property Act which runs as follows:

"Where any transaction relating to immovable property is required by law to be and has been effected by a registered instrument any person acquiring such property or any part of or share or interest in such property shall be deemed to have notice of such instrument as from the date of registration . . ."

The argument is that as the defendant acquired the mortgaged property after the transfer of his share by Ahmad Mehdi to the appellant by a registered instrument, the defendant must be deemed according to this explanation to have had notice of the transfer in favour of the appellant. This explanation to the definition of "notice" was inserted in the Transfer of Property Act by Act XX of 1929 which came into effect from the 1st of April, 1930 and section 63 of Act XX of 1929 shows that section 3 of the main Act which contains the definition of "notice" has not been given retrospective effect, so that the explanation referred to above does not affect the terms or incidents of transfers made before the 1st of April, 1930. As both the deeds of transfer in favour of the plaintiff as well as the defendant are prior to the commencement of Act XX of 1929, they are not, in our opinion, affected by the explanation to the definition of "notice" inserted in 1929. It cannot therefore be said that the payment of Rs.250 by the respondent to Ahmad Mehdi was anything but *bona fide*.

The appeal fails on both the grounds and is dismissed. In view of our conclusion that the appellant is not entitled to any mesne profits, the cross-objection succeeds with the result that the decree of the lower court is set aside and that of the trial court is restored. The parties will pay and receive costs in proportion to their success and failure in all the courts.

Appeal dismissed.

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