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the deceased, so that the residuary with another, when nearer to the deceased than the residuary in himself, is the first," and he gives this illustration: "Thus when a man has died leaving a daughter, a full sister, and the son of a half-brother by the father,—one-half of the inheritance is given to the daughter and the other half to the sister, who is a residuary *with* the daughter and nearer to the deceased than the brother's son. So, also, when there is with the brother's son a paternal uncle, the uncle has no interest in the inheritance."

We must, therefore, amend the order of the Subordinate Judge and direct that the name of the applicant be entered on the record as the person entitled to the residue of the estate of Waliunnissa. Costs to be costs in the proceedings.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

1899. *August* 9.

SUNDARABAI (ORIGINAL DEFENDANT NO. 3), APPELLANT, *v.* JAYAVANT BHIKAJI NADGOWDA (ORIGINAL PLAINTIFF), RESPONDENT.*

Damdupat—Mortgage—Redemp ion—Mortgage with possession—Mortgagee to take rent in part payment of interest—Remaining interest to be paid by mortgagor every year.

The *damdupat* rule applies in all cases as between Hindu debtors and creditors both in respect of simple as also of mortgage debts. (2) It does not, however, apply where the mortgagee has been placed in possession, and is accountable for profits received by him as against the interest due. (3) But where these profits are by the terms of the bond received for only a portion of the interest on the mortgage debt, the general rule of *damdupat* will govern such mortgage accounts.

SECOND appeal from the decision of F. C. O. Beaman, District Judge of Belgaum, confirming the decree of Ráo Bahádur L. G. Limaye, First Class Subordinate Judge.

Suit for redemption and possession of certain land.

The plaintiff had purchased the land from the defendants Nos. 1 and 2. It had been mortgaged on 24th June, 1861, by their ancestor to defendant No. 3 for Rs. 250. The plaintiff now sought to redeem this mortgage on payment of such sum as might be found due.

The following was the material part of the mortgage deed:—

* Second Appeal, No. 167 of 1899.

"We (mortgagors), having received Ankushi Rs. 250 (in letters two hundred and fifty) as debt from you (mortgagee), have agreed to pay interest on the said sum at the rate of 2¼ per cent. per mensem. As security for the said sum we mortgage with you a field at Halkarni, No. 134, 2 acres 18 gunthas, assessment Rs. 6, and have given you possession this day of the same. The rent of the said land is Rs. 25 per year. You should cultivate the field and every year in the month of 'Magha,' after taking an account of the interest due to you, you should deduct the said sum of Rs. 25 from the total sum of interest, and the remaining sum of interest we will pay every year."

The Subordinate Judge was of opinion that the principle of *damdupat* applied, and he accordingly directed redemption on payment by the plaintiff to defendant No. 3 (the mortgagee) of Rs. 500.

On appeal (by the mortgagee) the Assistant Judge was of opinion that the rule of *damdupat* did not apply to this case, and he remanded the suit in order that accounts might be taken, and, on taking accounts, a sum of Rs. 1,704-15-8 was found due to the mortgagee (defendant No. 3).

The plaintiff appealed, and the Judge being of opinion that the accounts had been taken on a wrong principle again remanded the case. On accounts being again taken, a sum of Rs. 589-3-0 was found due to the mortgagee. The Judge accepted this finding and passed a decree for redemption on payment of this amount.

The mortgagee (defendant No. 3) appealed, and the plaintiff filed cross objections under section 561 of the Civil Procedure Code.

The question on appeal was whether the rule of *damdupat* applied.

Scott (Acting Advocate General) with *G. S. Mulgaonkar* and *S. S. Mulgaonkar* for the appellant (the mortgagee).

Branson (with *V. G. Bhandarkar*) for the respondent (plaintiff).

The following authorities were cited :—*Narayan* v. *Satvaji* [1]; *Ali Saheb* v. *Shabji* [2]; *Gopal* v. *Gangaram* [3]; *Dhondshet* v. *Ravji* [4]; *Krishnaji* v. *Balaji* [5].

(1) (1872) 9 Bom. H. C. R., 83.
(2) (1895) 21 Bom., 85.
(3) (1895) 20 Bom., 721.
(4) (1896) 22 Bom., 86.
(5) P. J., 1896, p. 415.

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PARSONS, J. :—The disposal of this case has been greatly protracted by the irregular procedure in the District Court. The suit was filed in 1894 and decided on the 30th January, 1896, by the Court of first instance, which, applying the rule of *damdupat*, awarded Rs. 500 to the mortgagee (the appellant in this Court). In appeal the Assistant Judge thought that the rule of *damdupat* had no application and that an account ought to be taken of principal, interest and rent as provided for by the mortgage deed, but instead of remanding an issue, or taking the account himself as should have been done, he, on the 4th March, 1897, reversed the decree and remanded the case in order that an account be taken on the footing he had prescribed and a new decree passed.

On the 28th July, 1897, a new decree was passed, awarding Rs. 1,704-15-8 to the appellant. On appeal against this decree, the District Judge dissented from the mode in which the Assistant Judge had ordered the account to be taken, and ordered it to be taken again in a fresh manner, namely, by an account being taken of the actual profits received by the appellant, and he remanded an issue for that purpose on the 18th January, 1898. The case was returned without any finding on that issue (not because the Subordinate Judge was on leave, but because no evidence was adduced by the parties, see the entry in the roznáma under date the 24th March, 1898), and the District Judge again remanded it on the 2nd June, 1898. A finding was then returned to the effect that Rs. 589-3 were due on the mortgage and this was accepted by the District Judge, and a decree for redemption on payment of that amount passed on the 31st October, 1898. This appeal is filed against that decree, and the point for us to determine is how much is due on the mortgage.

The decision depends upon whether the rule of *damdupat* applies to the case or not. The material part of the deed of mortgage, (for we have nothing to do with the payment of nazarána), runs as follows :—

"We, having received Ankushi Rs. 250 (in letters two hundred and fifty) as debt from you, have agreed to pay interest on the said sum at the rate of 2½ per cent. per mensem. As security for the said sum we mortgage with you a field at Halkarni, No. 134, 2 acres 18 gunthas, assessment Rs. 6, and have given you possession this day of the same. The rent of the said land is Rs. 25 per

year. You should cultivate the field, and every year in the month of 'Magha' after taking an account of the interest due to you, you should deduct the said sum of Rs. 25 from the total sum of interest, and the remaining sum of interest we will pay every year."

The case is thus precisely similar to that of *Narayan* v. *Satvaji* [1]. The mortgagee was to hold the land without liability to account for rents and profits, and in consideration for that the mortgagor, instead of having to pay the sum of Rs. 67-8, the full interest, was to pay only Rs. 42-8 as interest. There could not, therefore, be any account taken of rents and profits. That the rule of *damdupat* applies to such a case has repeatedly been held by this Court; (we may almost say that it has never been questioned, certainly not in late years); and it is affirmed in the case just quoted. In the case of *Gopal* v. *Gangaram* [2], Candy, J., says (p. 725): "It is unnecessary to quote at length the many decisions in which it is shown that the rule of *damdupat* does apply to all cases in which the mortgagee has had no possession of the mortgaged property, or in which being in possession he takes the rents and profits in lieu of the whole or part of the interest. In such cases no account is taken on both sides, and, therefore, the rule of *damdupat* applies." In *Ali Saheb* v. *Shabji* [3], the facts were similar to those in the present case and the rule was applied to the Hindu mortgagor.

This being so, the first decision of the Court of first instance was undoubtedly right, and no more than double the principal ought to have been awarded to the mortgagee for the debt due under the mortgage. The amount of nazarána to be repaid is not disputed. We amend the decree by substituting Rs. 539 for Rs. 589-3. The amount still remaining unpaid is to be paid within six months of this date or the respondent will be foreclosed. We make no order as to costs in this Court.

RANADE, J.:—The only point of law involved in this case is whether the *damdupat* rule was applicable to the mortgage account in this redemption suit. The Court of first instance held that the *damdupat* rule applied, and it accordingly passed a decree for Rs. 500, to be paid by the respondent-plaintiff to

(1) (1872) 9 Bom. H. C. R., 83. (2) (1895) 20 Bom., 721.
(3) (1895) 21 Bom., 85.

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the mortgagee-appellant, defendant No. 3. In appeal Mr. Lord, the Assistant Judge, was of opinion that the *damdupat* rule did not apply as there was a running mortgage account, and he accordingly remanded the case with directions to make up a fresh account. The Court of first instance thereupon, setting aside the *damdupat* rule, found that the balance due was Rs. 1,704-15-8. Mr. Beaman, the District Judge, was not satisfied with this account, and remanded the case back again for a fresh account. In this second remand, the Court of first instance reduced the balance of the mortgage account to Rs. 589-3-0. The District Judge, Mr. Beaman, adopted this finding, and confirmed the decree, but at the same time he expressed an opinion that the *damdupat* rule ought to be made universally applicable to all mortgage accounts, or abrogated altogether. In the appeal before us, the mortgagee-appellant has raised the contention that the *damdupat* rule did not apply to the mortgage account in the present case.

It may be remarked at the outset that the remand made in this case under section 562 by Mr. Lord was irregular, and that the proper order should have been to send an issue under section 566 for determining the balance due.

As regards the principal point of law, it may be noted that the Court of first instance relied chiefly on the authority of the decision in *Shri Ganesh Dharnidhar* v. *Keshavrav*[1] in coming to the conclusion that the *damdupat* rule was applicable here. It was held in this last case that in a mortgage account, if after appropriation of rents and profits, the amount of interest payable exceeds the amount of the principal, this excess should not be allowed. The correctness of this last ruling was questioned in *Gopal Ramchandra* v. *Gangaram*[2], where it was held that the operation of the rule of *damdupat* must be excluded in all mortgages, the terms of which necessitate the existence of an account current between mortgagor and mortgagee, whatever the state of the account may be. It was on the strength of this ruling, supported by *Dhondshet* v. *Ravji*[3] and *Krishnaji* v. *Balaji*[4] that the Assistant Judge, Mr. Lord, came to the conclusion that the *damdupat* rule did not apply to the present case, inasmuch as

(1) (1890) 15 Bom., 625.
(2) (1895) 20 Bom., 728.
(3) P. J. for 1896, p. 202.
(4) P. J. for 1896, p. 415.

there was an account of profits and interest to be taken in this suit.

As the bond provided that the mortgagee should take the profits, which were estimated at Rs. 25, in lieu of a portion of the interest, and the mortgagor should pay the balance of interest himself, the present case must be distinguished from those noticed above, as also from the ruling in *Rango* v. *Balaji* [1]. In these cases, the accounts had to be taken generally of the interest on one side, and of profits on the other. A different class of cases has to be considered where, as in the present case, the rents and profits of the land are fixed at a particular amount which falls far short of the interest due. In such cases the principle would justify the application of the rule of *damdupat* in making up the final account. Accordingly it was held in *Shankara Bawa* v. *Babaji* [2] that where there is an express stipulation that rents and profits are to be taken in lieu of a fixed portion of the mortgage debt, the ordinary rule which governs cases of running mortgage accounts would not hold good. Similarly where the mortgagee has to receive the profits and rent without any liability to account, being responsible only for the payment of assessment, the *damdupat* rule has been held to apply—*Vasudeo* v. *Bhagvan* [3] and *Daji Gopal* v. *Daji Hari* [4]. There are two decisions in the earlier reports—*Vithal* v. *Daud* [5] and *Narayan* v. *Satvaji* [6]—which expressly cover the present case. In *Vithal* v. *Daud* the profits were by agreement to be received in lieu of past interest, and as no account had to be taken, the rule of *damdupat* was held to apply. This was also the view adopted in *Narayan* v. *Satvaji*. This intermediate class of cases must, therefore, be treated apart from the general rule which regulates running mortgage accounts.

To sum up, (1) the *damdupat* rule applies in all cases as between Hindu debtors and creditors, both in respect of simple as also of mortgage debts. (2) It does not, however, apply where the mortgagee has been placed in possession, and is accountable for profits received by him as against the interest due. (3) But

(1) P. J. for 1886, p. 76.
(2) P. J. for 1881, p. 291.
(3) P. J. for 1873, p. 32.
(4) P. J. for 1873, p. 74.
(5) (1869) 6 Bom. H. C. R., 90 (A. C. J.)
(6) (1872) 9 Bom. H. C. R., 83.

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where these profits are by the terms of the bond received for only a portion of the interest on the mortgage debt, the general rule of *damdupat* will govern such mortgage accounts. The inconvenience, to which Mr. Beaman in his judgment refers at some length, is thus obviated, and all equities are provided for.

I would, therefore, vary the decree, and hold that only Rs. 500 plus Rs. 39 for nazarána charges are due to the appellant. As he has received this sum, only Rs. 39 remain due. Each party to bear his own costs in this appeal.

Decree varied.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Candy.

1899.
September 11.

VINAYAK NARAYAN, APPLICANT,—DATTATRAYA KRISHNA DATAR, APPLICANT.*

Civil Procedure Code (Act XIV of 1882), Sec. 316—Execution—Sale—Sale absolute—Purchaser—Certificate of sale granted to the representative of deceased purchaser.

When a sale in execution has become absolute, the Court can, under section 316 of the Civil Procedure Code (Act XIV of 1882) grant the certificate prescribed therein to the representatives of a deceased purchaser.

REFERENCE by Ráo Sáheb Govind Vasudev Kanitkar, Subordinate Judge of Alibág, under section 617 of the Civil Procedure Code (Act XIV of 1882).

The reference was made in the following terms :—

"There are two applications (one in darkhást No. 818 of 1898, and another in darkhást No. 827 of 1897) for sale certificates, made apparently under section 316 of the Civil Procedure Code. The sales in both the cases have been formally confirmed and become absolute under section 314 of the Code.

"The applicants are the heirs (son in one case and grandson in the other) of the purchasers who died after the sale, and the question for decision is whether the heirs or legal representatives have a right to apply for and obtain a sale certificate under section 316, or, in other words, whether under the said section a Court is

*Civil Reference, No. 8 of 1899.