

about necessity of proof of notice has been clearly laid down by this Court, there would seem no hardship in insisting on its observance even if we had the power to dispense with it. But we have no such power. The plaintiff when he files his suit must allege the cause of action in the manner prescribed in section 50, and must prove the necessary allegations in so far as they are not admitted by the defendant.

In these circumstances, without expressing any opinion as to the nature of the defendants' tenure, we must reverse the decree of the lower Appellate Court and restore that of the Subordinate Judge, with costs of both appeals on the plaintiffs.

Decree reversed.

APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Fulton.

KUNDANMAL (ORIGINAL DEFENDANT), APPELLANT, v. KASHIBAI
(ORIGINAL PLAINTIFF), RESPONDENT.*

1901.

January 6.

Mortgage—Mortgagee in possession—Redemption—Accounts—Mode of taking accounts.

A mortgagor seeking to redeem must prove how much of the debt and interest has been repaid.

The duty of a mortgagee in possession is to keep a full, true and accurate account of the actual receipts and disbursements.

In taking accounts between a mortgagor and mortgagee, the Judge must decide as to the accuracy or otherwise of the accounts presented to him by the parties, and it is upon these accounts and the evidence before him in the case that he must find the amount payable on redemption.

SECOND appeal from the decision of A. Lucas, District Judge of Ahmednagar, modifying the decree of Ráo Sáheb G. K. Kanekar, Subordinate Judge of Nevása.

Suit for redemption and possession.

The plaintiff filed this suit in the year 1898 to redeem and recover possession of certain land, alleging that it had been mortgaged in September, 1874, by her deceased husband to the defendant's father for Rs. 445-8-0 at 10 annas per cent. per

* Second Appeal No. 232 of 1901.

1902.
 KUNDANMAL
 v.
 KASHIBAI.

month ; that the mortgage-debt had been satisfied by the usufruct of the property ; that the cause of action arose in 1898 ; and praying that if any balance remained due to the defendant, it might be made payable by annual instalments.

The defendant contended *inter alia* that the amount due on the mortgage was Rs. 1,500 and that the plaintiff not being an agriculturist was not entitled to the indulgence of payment by instalments.

At the trial the Subordinate Judge appointed a Commissioner to take the account of profits and disbursements in connection with the property, and the account made by him showed that there was a balance of Rs. 1,119-1-1 due on the mortgage.

The account was shown to the pleaders of the parties, and they did not question the correctness of the figure arrived at by the Commissioner.

The Subordinate Judge in his judgment observed that the rule of *dám-dapat* was not applicable to the case, because the defendant had been put in possession as mortgagee, and was therefore accountable for profits received by him as against the interest due. His findings were that the plaintiff was not an agriculturist ; that the mortgage-debt had not been satisfied ; that the land was capable of yielding an annual net income varying from twenty-one to forty-five rupees ; that the amount due by the plaintiff to the defendant was Rs. 1,119-1-1 ; and that the plaintiff should not be granted the indulgence of payment by instalments. He, therefore, on the 28th June, 1900, decreed that the plaintiff should pay to the defendant Rs. 1,119-1-1 and costs of the suit on the 31st March, 1901, and redeem and recover possession of the land free from the mortgage lien from the defendant, and, in default, that the plaintiff should be absolutely debarred from all her right to redeem the mortgage.

The plaintiff appealed, urging *inter alia* that the account had not been properly taken and that the lower Court was wrong in holding that she was not an agriculturist. The Judge, however, found that the plaintiff was not an agriculturist, but held that she was entitled to redeem the mortgage on payment only of the principal, viz. Rs. 445-8. He was of opinion that the defendant (mortgagee) had paid himself the interest due on the mortgage-debt in each year out of the profits of the land, and that thus

only the principal debt remained due. In his judgment he stated the mode in which he arrived at this conclusion as follows:

1902.

KUNDANMAJ

v.
KASHIBAI

I see no reason to distrust the finding of the Subordinate Judge that plaintiff is not an agriculturist. She undoubtedly has a shop, which brings in an income which is probably far greater than the income derived from her land.

The Subordinate Judge has allowed Rs. 1,119-1-1 to defendant from plaintiff.

This sum he has arrived at from the report of a Commissioner who prepared a statement from the defendant's accounts showing the principal sum due from year to year under the mortgage-deed in suit, the interest due thereon, and the realizations and net profits derived by defendant from the mortgaged land, which has been in his possession from the date of the mortgage in 1874 till the present day. The account relates to twenty-four years from 1874 to 1898, in which latter year this suit was instituted.

The Commissioner has reported that the net profits of the land would amount from Rs. 21 to Rs. 45 a year, the average of these two figures being Rs. 33. On examining the Commissioner's statement of account I find that defendant has actually credited in all Rs. 870 as profits of the land during the twenty-four years. Dividing this figure by 24 the result is an average profit of Rs. 36 a year.

It is true that in some years many small sums have been credited, while in others much larger ones appear, but the average profits have been Rs. 36 throughout this long term of years. The interest on the principal of Rs. 445-8-0 as allowed in the mortgage-bond comes to Rs. 33-6-7 a year, which is less than the average profits derived by the defendant from the land, and roughly the same as the amount arrived at by taking an average of the figures of Rs. 21 and Rs. 45 given in the Commissioner's report.

Under these circumstances I think I am quite justified in assuming that the defendant has paid himself the interest from year to year out of the profits of the land, and that all the plaintiff can be reasonably called upon to pay him is Rs. 415-8-0, the principal of the mortgage bond.

The defendant preferred a second appeal.

Daji A. Khare for the appellant (defendant):—The principle adopted by the Judge in arriving at the amount to be paid for redemption is erroneous. The account made up by the Commissioner was not objected to by the plaintiff in the first Court, therefore the Judge ought not to have departed from it. He has not taken into consideration the sums we spent in improvements and otherwise. These sums were mentioned in the Commissioner's account and no exception was taken to them. The Judge does not find that the Commissioner adopted a wrong principle in taking the account. An account between mortgagor and mortgagee cannot be made up on the basis of average profits.

1902.
 KUNDANMAL
 v.
 KASHIDAI.

In some years the income of the mortgaged property may be very small and in some it may be very large.

Gangaram B. Rele for the respondent (plaintiff):—It is not quite correct to say that we did not in the first Court question the correctness of the account made by the Commissioner. What happened in that Court was that the account was shown to our pleader by the Court and he asked for time to look into it. Beyond this nothing further happened.

According to the finding of the Judge the average annual net profits of the mortgaged land received by the mortgagee was Rs. 33 for twenty-four years. The total amount which the defendant thus received comes to Rs. 792. The rule of *dém- dupat* is, no doubt, not applicable to a case like the present. If it had been applicable, the defendant would have been entitled to get Rs. 891 in all; while according to the calculation made by the Judge, the defendant gets Rs. 450 over and above the sum of Rs. 792 which he has already obtained as mesne profits. The defendant thus gets Rs. 1,242 on account of the transaction. This circumstance seems to have weighed with the Judge when he ordered that the defendant was entitled to recover the principal only. Under the circumstances of the case, therefore, the order of the Judge is fair and equitable. It was contended that an account cannot be made up on average mesne profits. We submit that when the account extends over a number of years as in the present case, an average may fairly be taken. The account taken by the Commissioner shows this. That account shows that if the income in a particular year was low, the income in the previous or the following was high. Thus the total net income during the whole period affords a fair test to determine the net income of each year.

CANDY, J.:—In my opinion the District Judge was wrong in the principle on which he reversed the decree of the Subordinate Judge, and awarded redemption on payment of the principal debt only.

The parties are Marwaris and do not themselves cultivate land; it was therefore stipulated in the bond that the mortgagee might give the land for cultivation to a tenant, and out of the

landlord's moiety of the produce, after defraying the Government assessment, credit the balance against the debt.

At the outset of the suit there was the usual fringe of exaggeration on both sides. Plaintiff urged that she was an agriculturist (hoping of course to get the advantage of the Dekkhan Agriculturists' Relief Act), and that the debt had been satisfied by the usufruct of the land. Defendant pleaded that Rs. 1,500 were due to him; but this was an exaggeration which he did not persist in, for he produced his accounts, which purported to show what he credited every year as his share of the produce of the land, and he went into the witness-box and proposed that the accounts were true and authentic. He also put into the witness-box his tenant who had been in occupation of the land for twenty years, who could have been cross-examined if there had been any suggestion made that the accounts did not truly show the produce actually received and its true value. The plaintiff's pleader obtained an adjournment for five days in order to scrutinize the account which had been drawn up by two Commissioners on the basis of the accounts tendered by the defendant. No objection was taken, and it would seem from the evidence adduced by the parties that this absence of objection included both the defendant's accounts and the Commissioner's account drawn up on the basis of those accounts and in conformity with the terms of the mortgage bond.

The Subordinate Judge, therefore, awarded redemption on payment of Rs. 1,119-1-1, the sum arrived at in the Commissioner's account, the rule of *dūm-dūpat* not being applicable.

But plaintiff persisted in her exaggeration. She appealed to the District Judge, her main grounds of appeal being concerned with her plea that she was an agriculturist. On this point the District Judge found against her. Even on the question as to the terms on which she was entitled to redeem, the memorandum of appeal did not directly attack the plaintiff's accounts. And the District Judge apparently relied on them, for he accepted the figure (Rs. 870) given as the total of all the profits received by the mortgagee during the twenty-four years covered by the accounts. But then he proceeded to divide the figure 870 by 24; and as the result gave an average profit of Rs. 36 a year, and as the interest on the principal *if duly paid every*

1902.

KUNDANMAL
KASHIBAI.

1902.

KUNDANMAL
v.
KASHIBAL.

year came to Rs. 33 odd, he *assumed* that the defendant had paid himself the interest from year to year out of the profits of the land, and thus plaintiff could only be called on to pay the principal. Such an assumption cannot be justified, because we know that in some years the harvests, in the district in which this village (Sonai) is situated, were bad. In such years the produce could not have paid off the interest. In other years the harvest may have been good and then the produce must have exceeded in value Rs. 33, which sum represents the interest on the original principal. The accounts produced by defendant apparently tally with these well-known facts. If the accounts are correct for the total produce, why are they not good for the items of each year which make up that total? Plaintiff and her late husband and son lived in the village in which the land is situated. They must have known each year what the land was yielding and what the tenant was paying to the landlord. It was not suggested that they ever called on the mortgagee to produce his yearly account of the produce received by him or that he refused to show the same. It was not suggested that the prices fixed by the defendant were not according to the current rate of the day. Plaintiff is a shopkeeper and could easily have tested defendant's figures by her own accounts.

The case must, therefore, go back to the District Judge, who, having regard to the above facts and to the conduct of the case, and to the evidence recorded, and on an examination of the report of the Commissioner (Exhibit 32) and of the report and accounts prepared by the two Commissioners (Exhibits 43, 45), and after obtaining any explanation of the same if such be deemed necessary, will find what is the sum due to the mortgagee, on payment of which redemption should be allowed.

Costs to be costs in the appeal.

FULTON, J.:—The plaintiff sued to redeem certain land mortgaged in 1874 to the defendant to secure repayment of Rs. 445½ with interest at 10 annas per cent. per mensem (7½ per cent. per annum). There were to be monthly rests with interest on interest, and the mortgagee who was put into possession of the property was to give credit to the mortgagor for the profits.

The Subordinate Judge appointed a Commissioner to examine the accounts, and on his report, which was shown to the pleaders

of the parties who did not question the correctness of the figures arrived at, found that Rs. 1,119-1-1 remained due to the mortgagee after giving credit for the profits admitted in the account to have been received.

The evidence was principally directed to the question whether the plaintiff, who is the widow of the mortgagor (a Marwari), was or was not an agriculturist. This question was decided in the negative.

The only evidence bearing on the correctness of the accounts was (1) that of the defendant, aged 39, who said :

I have got my accounts. They are regularly kept in the ordinary course of business. I have kept accounts of the management of the land in suit. I have given in evidence extracts of my accounts. They are correct. The accounts are not settled with the plaintiff. There is one well in the land in suit. The supply of water in the well is short. The land in suit is three miles distant from Sonai. Mahadu witness is my debtor.

and (2) that of Mahadu, the cultivator, who said :

I am in occupation of the same for twenty years. The defendant receives 5 to 10 maunds of grain as profits of his share per annum. At times he is required to pay assessment of the same out of his own pocket. There is one well in the land. I have grown garden crop in three *bighas* of the land in suit. The land in suit was ploughed by me. I am not a debtor of the defendant. The land is distant from our village, and so irrigated crops are not grown every year therein. This year being famine year I have grown that crop by the use of water of the well.

The plaintiff, who is the widow of the mortgagor, was examined as to her shop, but said nothing about the produce of this land. Possibly she knew nothing about it, as neither her own pleader nor the defendant's pleader nor the Subordinate Judge asked her any questions on the subject. At any rate her evidence has no bearing on the point.

Although it is stated that the correctness of the figures of the Commissioner's report was not questioned, it is not stated in either judgment that the correctness of the accounts was admitted. In appeal to the District Judge the correctness of the accounts was expressly impugned as follows :

(2) It has been wrongly held by the lower Court that the mortgage-debt has not been satisfied.

(3) A very low estimate of the net annual produce of the land in dispute has been wrongly made.

1902.

KUNDANMAL
v.
KASHIBAI.

1902.

KUNDANMAL
c.
KASHIBAI.

(8) The lower Court has erred in not appointing a Commissioner to report as to the capacity of the property regarding its income, though it was proper and just to do so.

The District Judge disposed of the appeal as follows :

The Subordinate Judge has allowed Rs. 1,119-1-1 to defendant from plaintiff.

This sum he has arrived at upon the report of a Commissioner, who prepared a statement from the defendant's accounts showing the principal sum due from year to year under the mortgage deed in suit, the interest due thereon, and the realizations and net profits derived by defendant from the mortgaged land, which has been in his possession from the date of the mortgage in 1874 till the present day. The accounts relate to twenty-four years from 1874 to 1898, in which latter year this suit was instituted.

The Commissioner has reported that the net profits of the land would amount from Rs. 21 to Rs. 45 a year, the average of these two figures being Rs. 33. On examining the Commissioner's statement of account, I find that defendant has actually credited in all Rs. 870 as profits of the land during the twenty-four years. Dividing this figure by 24 the result is an average profit of Rs. 36 a year.

It is true that in some years many small sums appear, but the average profits have been Rs. 36 throughout this long term of years. The interest on the principal of Rs. 445-8-0, as allowed in the mortgage bond, comes to Rs. 36-6-7, which is less than the average profits derived by the defendant from the land and, roughly, the same as the amount arrived at by taking an average of the figures of Rs. 21 and Rs. 45 given in the Commissioner's report.

Under these circumstances I think I am quite justified in assuming that the defendant has paid himself the interest from year to year out of the profits of the land, and that all the plaintiff can be reasonably called upon to pay him is Rs. 445-8-0, the principal of the mortgage bond.

On second appeal Mr. D. A. Khare, who appeared* for the mortgagee, attacked the District Judge's decision on the ground that he did not say the accounts were wrong; that an average could never be accepted; and that it must be incorrect.

Now I have had doubts whether we ought not to confirm the decree, for the question what the annual profits amounted to was one of fact and not one of law. Still after carefully considering Mr. Khare's argument it must, I think, be conceded that before having recourse to an estimate not based on actual figures, a judge of fact must apply his mind carefully to the account which purports to be the account of actual receipts and disbursements, and determine on its inherent appearance of accuracy and probability and any other evidence that may be available whether it is an account which most probably represents correctly what

has actually occurred. The law seems to be plain. The mortgagor seeking to redeem must prove how much of the debt and interest has been repaid: *Shah Mukhun Lall v. Baboo Sree Kishen Singh*.⁽¹⁾ The duty of a mortgagee in possession is to keep a full, true and accurate account of the actual receipts and disbursements.⁽²⁾ When an account is presented, the judge of fact on whom rests the responsibility of coming to a true decision must examine it, and before arriving at a conclusion as to whether it is such an account as a prudent man ought to accept, he must consider the details and ascertain whether it has been kept on principles which indicate that it is probably correct. The account books in the present case have not been sent up to this Court. Possibly they may contain information which may remove the difficulties suggested by the Commissioner's summary. I have had that summary translated and note points which require explanation. I find that from 9th September, 1874, to 29th January, 1879—a period including the well-known famine years of 1876-77—the profits were sufficient to pay the interest. On the 29th January, 1879, the balance due was Rs. 434-9-9. After that there was an uninterrupted increase of debt every year down to the end. How is that increase to be accounted for? Neither Court has suggested any explanation. In the earlier years there is a frequently recurring figure of Rs. 14-1-3 added to principal, and in later years of Rs. 21-4-0. What do these figures represent? If they are on account of assessment, the change of rate, which may be due to a revised settlement, needs explanation. These are difficulties which are obvious on the face of the Commissioner's report. It is very possible that by reference to the account books or by questioning the plaintiff or the Commissioner they may be cleared away; but at present it is not apparent how the figures have been entered. It is not clear whether in the books any details are given of the quantities of grain received and of the rates of commutation or whether only money items have been entered, as shown in columns 5 and 6 of the Commissioner's statement. I think that before accepting or rejecting accounts in suits between mortgagor and mortgagee it

1902.

KUNDANMAL
v.
KASHIBAL.

(1) (1868) 12 Moore's I. A. 157 at p. 192.

(2) Transfer of Property Act, section 76 (c), which merely reiterates the old law.

1902.

KUNDANMAL

v.

KASHIBAI.

is usually necessary to examine them critically. The omission of the mortgagor to assist by criticizing the items may, of course, be taken into consideration. In some cases such omission may be accepted as showing that the accounts cannot be attacked or, in other words, are known to be correct. But in other cases it may merely indicate ignorance of the proper course to take or an inability on the part of the client to give suitable instructions to his pleader. No general rule can, of course, be laid down. In the Presidency town the party is expected to show where the accounts are wrong, but the procedure applicable there may not always be equally suitable for the *mofussil*. This is recognized in the Civil Procedure Code, which, instead of laying down rules for taking exceptions to the reports of Commissioners, simply provides in section 395 that their proceedings shall be received in evidence, leaving it to the Court to assign to such evidence the weight which the circumstances and the substance of the report may seem to justify. While it is true that no general rule as to the value of accounts can be laid down, still it is clear that in each case all the circumstances must be considered, such as the relative positions of the parties to each other, the trade or caste of the mortgagor, and any other matters likely to be material. It is for the party who puts forward the accounts to explain them and support them in such a way as to convince the Judge that there is such a probability of their accuracy as to make it reasonable for a prudent man to accept them. If the Judge accept them as correct, he ought to act on them. If he thinks that they are not correct and ought not to be acted on, then he must do his best to form an estimate of the probable produce on the evidence that is available. Such an estimate, which will of necessity usually be based on average profits, cannot of course be accurate, but, if moderate and reasonable, can be adopted on the ground that it is fair to draw inferences against the mortgagee in possession, because he, being the party who alone can know the actual facts, has failed to keep the accounts in a manner in which the Court can safely accept them.

I have gone into this subject at some length, partly because I think that the method of dealing with these accounts, which frequently, as in the present case, cover a great many years, is often not very clearly understood. The burden of proof, indeed, is on

the mortgagor, but the nature of the proof which he can give will naturally in most cases be only of a general character as to the probable profits that the land, if properly managed, ought to yield, and may consist partly of admissions contained in the defendant's account books. The subject is in some measure dealt with in *Shah Mukhun Lall v. Baboo Sree Kishen Singh*⁽¹⁾ in the passage on page 197 commencing "The contents of the documents themselves, however, furnish more ground for doubting their accuracy, &c.," but it will of course be remembered that the circumstances of each case are different from those of other cases.

In the present case the defect of the District Judge's judgment appears to be that he has not expressed any clear opinion as to the accuracy or otherwise of the accounts presented by the mortgagee. He has arrived at a result which can only be arrived at if he distrusts the accounts, but he has not stated that he does distrust them either wholly or in part; and it does not appear that he has fully realized the necessity of making up his mind as to their accuracy or otherwise.

In these circumstances I have come to the conclusion, though not without hesitation, that his decision cannot be accepted. I think we must, therefore, reverse his decree and remand the case for a fresh decision in reference to the above remarks. It would not, in my opinion, be correct for this Court to restore the decree of the Subordinate Judge on reversing the decree of the District Judge. The parties have a right to a finding of the Appellate Court on the facts, and we are not entitled to substitute our opinion for that of the District Judge. Besides, in the present case, after studying the Commissioner's report, I should hardly be prepared to hold that on the evidence as it has come before us we are in a position to give any satisfactory opinion.

Costs to be costs in the appeal. As the mortgage deed and the Commissioner's report have been translated, I think that copies of these translations should be annexed for the use of the District Judge.

Case remanded.

(1) (1868) 12 Moore's I. A. 157.