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definitions in those Acts, the result would have been the same. When the Legislature directs in an Act that a certain thing shall be deemed to be another thing which in fact and truth it is not, the Court is entitled and bound to ascertain for what purposes the statutory fiction which it has created is to be resorted to and to confine the operation of the fiction to those purposes. Assuming, however, that because a debt secured by a simple mortgage of land creates a charge on it, it is an interest in immoveable property, and as such is immoveable property itself, we have, as I said at the outset, a clear indication of the intention of the Legislature that for the purposes of the Code of Civil Procedure it should be treated as moveable property. On this ground I agree in discharging the rule with costs.

Rule discharged.

APPELLATE CIVIL.

Before Mr. Justice Fulton and Mr. Justice Chandavarkar.

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December 13.

RAM SONJI PARULEKAR (ORIGINAL DEFENDANT 2), APPELLANT, v.
KRISHNAJI SONJI PARULEKAR (ORIGINAL PLAINTIFF), RESPONDENT.*

Mortgage—Redemption—Mortgage-debt tendered and deposited in Court—Possession of mortgaged property obtained by mortgagee—Mesne profits—Claim to mesne profits by mortgagor after tender of mortgage-debt and deposit in Court—Transfer of Property Act (IV of 1882), sections 83-84.

In 1890 the plaintiff mortgaged certain land to the first defendant without possession for Rs. 700. The mortgage-deed provided that the plaintiff (mortgagor) should remain in possession and pay interest to the first defendant until the mortgage-debt was repaid. In 1895 the first defendant sued the plaintiff on the mortgage and a consent decree was passed, which directed that the defendant therein (the present plaintiff) should pay Rs. 300 on the 7th October, 1897, and Rs. 400 on the 7th October, 1898, and in case of default in either payment on the specified date possession of the land should be given up to the plaintiff therein (the present defendant 1). Default was made in payment of the first instalment on the 7th October, 1897, and the present first defendant thereupon applied for possession in execution of the said consent decree, which possession he did not obtain until the 3rd April, 1898, and he then assigned it for value to the second defendant. In the meantime, however, (viz. on the 19th

* Second Appeal No. 374 of 1901.

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March, 1898), the plaintiff (mortgagor), under section 83 of the Transfer of Property Act (IV of 1882), tendered and deposited in Court the Rs. 700, and subsequently demanded possession of the land. The second defendant refused to give it up, and the plaintiff thereupon filed this suit for redemption. He also claimed the mesne profits of the land from the date at which he deposited the Rs. 700 in Court, *i.e.* the 19th March, 1898.

The Court of first instance held that the plaintiff was entitled to redeem on payment of the Rs. 700, but was not entitled to mesne profits. The lower Appellate Court held that under section 84 of the Transfer of Property Act (IV of 1882) the plaintiff was entitled to mesne profits from the date on which the first defendant took possession of the land (3rd April, 1895), and ordered redemption on payment by the plaintiff of the Rs. 700 less the amount of such mesne profits. On second appeal,

Held, (reversing the decree of the lower Appellate Court and restoring the decree of the Court of first instance) that the plaintiff was not entitled to mesne profits, but was entitled to redeem on payment of the Rs. 700. By the consent decree the first defendant became entitled to possession on the 7th October, 1897, although he did not actually get possession until the 3rd April, 1898. By that decree the right to redeem accrued to the plaintiff only after the defendant had got possession. The plaintiff (mortgagor) could not defeat the right of possession which had accrued to the first defendant (mortgagee) by tendering and depositing the mortgage-debt in Court on the 19th March, 1898. That tender was premature and the provisions of sections 83 and 84 of the Transfer of Property Act (IV of 1882) did not apply to the case.

SECOND appeal from the decision of RAO Bahádur Mahadev Shridhar, First Class Subordinate Judge, A. P., at Ratnágiri, varying the decree passed by RAO Sáheb Vishvanath A. Wagh, Subordinate Judge at Málvan.

Suit for redemption.

Defendant 1 was the mortgagee and defendant 2 was in possession and was alleged to be assignee for value for defendant 1.

The plaintiff mortgaged the land in question to the first defendant for Rs. 700 on 17th February, 1890. The mortgage-deed provided that the plaintiff should remain in possession, should pay the Government assessment, and should also pay interest to the first defendant until the mortgage-debt was repaid.

In 1895 the first defendant sued the plaintiff on the mortgage (Suit No. 391 of 1895) and a consent decree was passed which directed that the plaintiff should pay him Rs. 300 on the 7th

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October, 1897, and Rs. 400 on the 7th October, 1898, and in case of plaintiff's default in making either payment on the specified date, he should give up possession of the land to the first defendant.

The plaintiff failed to pay the Rs. 300 on the 7th October, 1897.

The first defendant thereupon applied for execution of the consent decree and he obtained possession of the land on the 3rd April, 1898.

The first defendant subsequently sold the land to the second defendant and the latter took possession.

On the 19th March, 1898, the plaintiff tendered Rs. 700 and deposited it in Court under section 83 of the Transfer of Property Act (IV of 1882), and subsequently demanded back possession of the land. The second defendant refused to give up possession.

On 6th April, 1898, the plaintiff filed this suit for redemption and possession and he claimed mesne profits from the 19th March, 1898, *i. e.* the day on which he tendered and deposited the Rs. 700.

The Subordinate Judge of Málvan passed a decree that the plaintiff was entitled to redeem on payment of the Rs. 700, but held that he was not entitled to mesne profits.

On appeal the Judge held that under section 84 of the Transfer of Property Act (IV of 1882) the plaintiff was entitled to mesne profits from the date on which the defendant took possession of the land and that the defendant should give credit for the amount. He, therefore, varied the decree and ordered "that plaintiff pay defendant 2 Rs. 700 less the net profits of the land derived by the defendants from the date possession was obtained by them under the consent decree till recovery of possession by plaintiff."

In his judgment he said :

Section 84 of the Transfer of Property Act enacts, when the mortgagor has tendered or deposited in Court under section 83 the amount remaining due on the mortgage, interest on the principal money shall cease from the date of the tender, &c. The question on which the whole dispute in this case must rest is whether the amount of Rs. 700 was sufficient to satisfy the mortgagee or whether anything over and above that amount was due by plaintiff for interest and Government assessment. The consent decree in Suit No. 391 of 1895 was not a decree for redemption or foreclosure and did not take away the plaintiff's right of redemption. Though under its provisions the defendants were entitled to

obtain possession after plaintiff's failure to pay the first instalment, still defendants were bound to accept their mortgage-money when tendered and allow redemption. If, therefore, the tender was a sufficient tender to discharge the whole of the mortgage money, defendants were not justified in rejecting it and executing the decree and obtaining possession. The profits of the mortgaged land which defendants have received since the tender defendants must account for. Whatever amount, whether Rs. 700 or more, is due on the mortgage, the profits must be applied towards satisfaction of that amount. The question, therefore, simply is, what was the amount due on the mortgage when the tender of payment through the Court, under section 83 of the Transfer of Property Act, was made by the plaintiff and rejected by the defendants?

Defendant 2 appealed to the High Court.

S. S. Patkar for appellant (defendant No. 2):—The mortgagee is entitled to more than Rs. 700 deposited in Court by plaintiff on the 19th March, 1898. By the terms of the consent decree in Suit No. 391 of 1895 the mortgagee was entitled to possession on the 7th October, 1897, on plaintiff's failure to pay Rs. 300 on that day, and to retain possession till redemption. The lower Courts ought to have awarded interest on the Rs. 700 from the date of the default, i.e. the 7th October, 1897, until the defendant got possession on the 3rd April, 1898.

The lower Appellate Court awards mesne profits to the plaintiff on the ground that the mortgagee was not justified in refusing the tender. We contend that he was, firstly, because the tender was not sufficient, as more than Rs. 700 were due at that time; secondly, because the deposit was made after the mortgagee had presented a *durkhast* (application for execution) under the consent decree and was about to take possession; and thirdly, because the mortgage money had not become payable on the 19th March, 1898, as Rs. 400 under the consent decree were to be paid on the 7th October, 1898. The rights of the parties must be determined according to the terms of the consent decree. Sections 83 and 84 of the Transfer of Property Act (IV of 1882) do not apply. According to the consent decree the mortgagee was entitled to possession till redemption, that is, till a suit for redemption was brought: see *Ravji Shivram v. Kaluram*.⁽¹⁾ The mortgagee is not liable to account for mesne profits: see *Tani Bhagwan v. Hari*.⁽²⁾

⁽¹⁾ (1873) 12 Bom. H. C. R. 190.

⁽²⁾ (1887) P. J. 315.

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H. C. Ooyaji for respondent (plaintiff) :—The ground upon which the mortgagee declined to accept the money which we deposited in Court on the 19th March, 1898, was that the amount was inadequate. The Courts below, however, concur in holding that that was the proper amount. That being so, the mortgagee was entitled only to take that amount, but not to take possession of the property. Under the consent decree the mortgagee was not entitled either to take, or remain in, possession after redemption, *i. e.* after the mortgage money was paid; and we sufficiently satisfied the terms of that decree by paying the amount into Court. Having taken possession of the property *after* the money had been deposited, and in face of our protest, the mortgagee rendered himself liable to account for the profits subsequently recovered by him.

CHANDAVARKAR, J. :—The lower Appellate Court has applied sections 83 and 84 to this case and held the mortgagee accountable for mesne profits from the date on which he obtained possession under the consent decree passed between the parties in the previous suit. But that decree clearly provided that if the mortgagor committed a default in the payment of Rs. 300 on the 7th October, 1897, the mortgagee should be entitled to take possession. The mortgagor having committed a default, the mortgagee became entitled to possession on that date. The mortgagee did not, however, get possession until the 3rd April, 1898; but before that date, *i. e.* on the 19th March, 1898, the mortgagor had deposited the mortgage amount in Court under section 83. But the mortgagor could not defeat the right of possession which had accrued to the mortgagee by making a tender of the mortgage amount on the 19th March, 1898, as, according to the consent decree, the right to redeem could accrue only after the mortgagor had delivered possession to the mortgagee. The tender made on the 19th March was under the circumstances premature and the provisions of sections 83 and 84 cannot apply to the facts of the case.

Following the Full Bench ruling in *Tani Bhagwan v. Hari bin Bhawani*⁽¹⁾ and *Malhar Gopal Kulkarni v. Anandram valad*

Hukumchand,⁽¹⁾ we reverse the decree of the lower Appellate Court and restore that of the Subordinate Judge. The plaintiff to pay the costs of this appeal and the appeal in the lower Appellate Court. Defendant 2 to bear the costs of the cross-objections, if any, in the lower Appellate Court.

Decree reversed.

(1) (1880) P. J., p. 51.

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APPELLATE CIVIL.

Before Mr. Justice Fulton and Mr. Justice Chandavarkar.

JANARDHAN KRISHNA PADHYE (ORIGINAL PLAINTIFF), APPELLANT,
v. RAMCHANDRA VITHAL RANADE (ORIGINAL DEFENDANT),
RESPONDENT.*

1901.

December 16.

*Practice—Procedure—Appellant dead at the date of hearing of appeal—
Legal representative placed on record and appeal re-heard—Civil Procedure
Code (Act XIV of 1882), sections 571, 374.*

At the date of the hearing of an appeal the appellant was dead, but neither his Pleader nor the Court was aware of the fact. The Court heard and decided the appeal. Subsequently, the deceased appellant's son applied that his name should be placed in the record and that the appeal should be re-heard. The lower Appellate Court rejected this application.

Held, that under the circumstances and having regard to section 571 of the Civil Procedure Code (XIV of 1882), the decree of the lower Appellate Court was a nullity, and that as the legal representative of the appellant applied within the prescribed period to have his name entered on the record, the Court was bound, under section 365 of the Civil Procedure Code, to enter his name. In not doing so the lower Court had failed to exercise a jurisdiction vested in it by law. The High Court, therefore, under section 622 of the Civil Procedure Code (XIV of 1882), directed the applicant's name to be placed on the record and the appeal disposed of.

SECOND appeal from the decision of Ráo Bahádur Vaman M. Bodas, Joint First Class Subordinate Judge, A. P., at Ratnágiri, confirming the decree passed by Ráo Sáheb Janardhan D. Dixit, Subordinate Judge of Devgad.

* Second Appeal No. 352 of 1901.