ing," which appear in s. 32, the power given by the section ought to be exercised before the first hearing; and as the objection was taken in the written statement, it was mere perversity of the original plaintiff to wait until the hearing before he asked for the administratrix to be made a co-plaintiff.

The order of the Court below being in my opinion technically wrong, the appellants would be entitled to have the decree reversed with costs in both Courts. But inasmuch as substantial justice was in fact done by the decree in ordering payment to the administratrix, I also should be willing, if the parties consent, and for the purpose of saving expense, to allow the decree to stand so far as it directs payment to the administratrix. But whether the parties consent or not, I think the plaintiff must pay the whole costs of suit and appeal, to be set off against the decree, if the parties elect to let the decree with the proposed modification stand.

Appeal allowed.

Attorneys for the appellants: Messrs. *Beeby* and *Rutter*.

Attorney for the respondent: Baboo *Brojonath Mitter*.

APPELLATE CIVIL.

Before Mr. Justice Pontifex and Mr. Justice McDonell.

DOOLEE CHAND AND OTHERS (DECREE-HOLDERS) *v.* OMDA KHANUM, *alias* BABU SHUBIBU AND OTHERS (JUDGMENT-DEBTORS).*

1880 *June* 3.

Mortgage Decree for Account and Sale—Taking of Accounts—Withdrawal of Execution-Proceedings—Principle on which Accounts are to be taken.

A mortgagee, who has obtained a decree for an account and sale, is not entitled to withdraw from the taking of accounts in his execution-proceedings, when those accounts appear to be going against him.

THE appellants in this case had obtained a decree for an account and for the sale of certain property mortgaged to

* Appeal from orders, Nos. 174 and 175 of 1879, against the order of G. E. Porter, Esq., Officiating Judge of Gya, dated 7th June 1879, affirming the order of Baboo Matadin, Subordinate Judge of that district, dated the 30th August 1878.

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them by the respondents. But finding that, at the taking of the accounts, the balance was against them, they applied to the Subordinate Judge of Gya to allow them to withdraw from further execution-proceedings. The Subordinate Judge, on the 30th August 1878, whilst allowing them to stop proceedings, refused to permit them to withdraw or strike off the case until the accounts were settled.

The decree-holders appealed to the Judge of Gya, who confirmed the order of the lower Court, and dismissed the appeal.

The decree-holders then appealed to the High Court.

Baboo *Mohesh Chunder Chowdhry* and Baboo *Nilmadhub Sen* for the appellants.

Mr. *C. Gregory* and Baboo *Prannath Pundit* for the respondents.

The judgment of the Court (PONTIFEX and MCDONELL, JJ.) was delivered by

PONTIFEX, J.—The main question in this appeal is, whether a mortgagee, who has obtained a decree for accounts and sale, is entitled to withdraw from the execution-proceedings when those accounts appear to be going against him. There is a subsidiary question, *viz.*, if he is not so entitled, upon what principles are the accounts to be taken between the parties?

Now we think, that the essence of foreclosure and redemption suits is, that in such suits each party is entitled to enforce his rights. A plaintiff claiming foreclosure is bound, upon the accounts being taken, if the balance is against him, to pay that balance. On the other hand, a plaintiff claiming redemption must submit to a decree for sale or foreclosure if he makes default in payment. Unless this were so, there would be a multiplicity of suits. To avoid this, it is necessary, under decrees for foreclosure or redemption, that the accounts between the parties should be settled and discharged. In this case, the plaintiff obtained a decree on the 12th May 1862 upon a mortgage-deed, and he claims that, previously to the mortgage

to him, he held under the mortgagor, the predecessor in title of the defendants, a zur-i-peshgi lease, and he also claims, as I understand, that at the expiration, or soon after the expiration, of the zur-i-peshgi, the defendants themselves entered into another ticca arrangement with him. A question that has been repeatedly raised in this suit, and which has been before the High Court no less than four times, is, whether the plaintiff is to be treated as a mortgagee in possession in taking the accounts,—that is to say, whether the zur-i-peshgi deed and alleged ticcadari are to be disregarded.

At first, by some inadvertence in Mr. Justice Phear's judgment, it seems to have been laid down that he was to be treated as a mortgagee in possession; but, on a subsequent appeal, Mr. Justice Phear distinctly stated that, if that construction had been placed upon his judgment, it was what he never intended. Of course, if the mortgagee held possession under any contract of title distinct from his mortgage, he would be entitled to set up that title, and insist that his possession under that contract was distinct from his mortgage title, and that he could, during such possession, only be charged with rent payable under that distinct contract. Now, when the case came before Mr. Justice Phear on the 13th March 1875, a decree was passed by this Court, directing that certain accounts should be taken, and under the terms of that decree as it stands, the plaintiff would have to account as a mortgagee in possession. Although that decree has not actually been set aside, and although no decree has been made in its place, yet it clearly appears from the judgment of Mr. Justice Phear of the 28th July 1876, that it was not the intention of the Court that the account should be taken against the mortgagee as against a mortgagee in possession. It is therefore necessary for us now to do justice between the parties. We agree with the lower Court in thinking that the mortgagee is not entitled to withdraw from the taking of accounts in his execution-proceedings at his own will and pleasure. The decree of Mr. Justice Phear of the 13th March 1875 directed that the defendant, if a balance was due from him, should pay such balance to the plaintiff, and if, on the other hand, a balance was due from the plaintiff, he should pay such balance to the

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defendant; and that appears to us to be the proper principle upon which a decree should be made.

We therefore dismiss the appeal on the main ground which has been taken before us.

In sending back the case to the Court below, we think we ought to point out distinctly, and so as to prevent future litigation between the parties, the principles upon which the accounts should be taken. We are of opinion that an account should be taken half-yearly of the interest due from the mortgagor under the mortgage-deed, and that, from such half-yearly amounts of interest, should be deducted the rent payable but unpaid by the mortgagee during such half year under any contract for possession, separate and independent of the mortgage; and if, for any period the mortgagee was in possession, rent became due under any such separate or independent contract, during such period, he should be charged as a mortgagee in possession. The balance of interest half-yearly (if any) will not carry interest up to the date of the decree. But an account must be made up, as on the date of the decree of the 12th May 1862, of the principal and interest, after making such deductions as I have mentioned, due to the plaintiff at that time. Upon that aggregate amount interest will again be calculated at one per cent per mensem, and against the subsequent half-yearly accounts must be set off the amounts payable and unpaid by the mortgagee in respect of rent under any contract for possession, separate and independent of the mortgage; and for any period uncovered by such separate and independent contract, such a sum as should be charged against a mortgagee in possession.

The accounts being so taken, the mortgagor must pay the balance, if any, found due from him on such account, to the plaintiff, the mortgagee. On the other hand, if a balance is found due from the plaintiff, the mortgagee, to the defendant, the plaintiff must pay such balance to the defendant.

We think, in order to put a stop to further litigation between the parties, that, if any difficulty arises in carrying out this order, the parties should have liberty to apply direct to this Court. As the appellants have failed on the main point of their appeal, they must pay the costs of this appeal.

The record will be sent down at once, and the parties must carry in their accounts within six weeks of the arrival of the record in the Court below, with liberty for such Court to extend the time on a proper case being made.

Appeal dismissed and case remanded.

PRIVY COUNCIL.

SHOSHINATH GHOSE AND OTHERS (PLAINTIFFS) *v.* KRISHNA-SUNDERI DASI (DEFENDANT).

P C.*
1880
July 7 & 8.

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

Hindu Law—Adoption among Sudras—Execution of Mutual Deeds—Actual giving and taking of Child.

Although it has been held that, in the case of Sudras, no ceremonies except the giving and taking of the child are necessary to an adoption, yet it is not to be taken for granted, that such giving and taking can be completed by the execution of mutual deeds without more; but, *semble*, that, according to Hindu usage which the Courts should accept as governing the law, the giving and taking in such an adoption ought to take place by the father handing over the child to the adoptive mother, the latter intimating her acceptance of the child in adoption.

In this case it was found on the evidence, that it was not the intention of the parties to complete the adoption by the mere execution of the deeds.

APPEAL from a decree of the High Court of Bengal (5th February 1878), confirming, except as to costs, a decree of the District Judge of Bhagalpore (8th February 1876), whereby the suit was dismissed.

The first appellant sued, in January 1875, to establish the fact of his adoption in 1864 by the respondent, the widow of Dwarkanath Ghose, who, before his death in 1863, had orally given to her power to adopt. The co-appellants were joined in the suit, having purchased a part of the estate claimed; and the object of the suit was to obtain a declaration of the right of the alleged adopted son to possession of the estate of Dwarkanath

* *Present:*—SIR J. W. COLVILE, SIR B. PEACOCK, SIR M. E. SMITH, and SIR R. P. COLLIER.