
(1924) 01 CAL CK 0011
In the Calcutta High Court

Sudhanya Kumar Bose Ray Chaudhury	APPELLANT
Vs	
Sreemutty Sushilabala Bose Ray Chaudhury	RESPONDENT

Date of Decision : 21-01-1924

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1

Citation : 85 Ind. Cas. 547

Hon'ble Judges : Rankin, J; Mukerji, J

Bench : Division Bench

Judgement

Rankin, J.—In this case, I am of opinion that the appeal fails and must be dismissed. It appears that the present plaintiff who was the second mortgagee in respect of certain plots of land brought a suit for redemption claiming that prior to the institution of the suit she had made a sufficient tender. She accordingly claimed not merely possession of the" mortgaged property but claimed also mesne profits from the institution of the suit until such date as she could get delivery of possession. The Trial Court as regards the question of mesne profits allowed her to withdraw that claim with, permission to sue again. But the ultimate effect of the suit was this that it was held that there had been no sufficient tender before the suit and a preliminary decree was made under which a certain sum was fixed and that sum was after the decree paid into Court in pursuance of the decree. Thereupon, of course, the first mortgagee was obliged to take that sum in, full discharge and to reconvey and to re-deliver the property and in the present case the date on which the sum ultimately found to be sufficient was paid into Court was the 20th June 1917. An appeal was then taken from that decree but the ultimate effect of that appeal was not to render the sum so paid insufficient. It is now contended on behalf of the defendant-appellant that, in a subsequent suit for mesne profits for the period beginning from the 20th June 1917 and ending on the 25th December 1918 when possession was actually given, the plaintiff's claim is barred because she had claimed mesne profits in the redemption suit and had withdrawn that claim without the advantage of getting leave to sue again,, for it. The case cited and relied upon by

the lower Appellate Court in *Sakari Datta v. Sheikh Ainuddy* 6 Ind. Cas. 336 : 14 C.W.N. 1001 : 12 C.L.J. 620 says that mesne profits from the date subsequent to the decree when the money is paid into Court by the mortgagor could not be claimed in the redemption suit and it does not appear to me that the learned Vakil for the appellant in his careful analysis of the various statutory provisions has succeeded in showing that there is any relevant difference on this point between the present law under the new Code and the old law under the Transfer of Property Act. In any view, to pass a decree for mesne profits which will not arise unless the mortgagee fails to obey the order of the Court is a very doubtful order to make. One could understand an order granting liberty to apply as to mesne profits in the event of a failure; but no Court would regard it as obligatory to pass a hypothetical decree with reference to a cause of action that may never accrue for one or other of several reasons. It seems to me that it would be straining Order XXIII, Rule 1, Order VI, Rule 1 and Section 11 of the C.P.C. to apply it as we are invited to do to a wholly future cause of action. I can find no authority for such a course and, in the absence of very strong authority I have a clear opinion that it was never intended by the Legislature.

2. The question with regard to the standing crops appears to be very simple because it does not appear that the decree appealed from has, in fact, failed to give to the prior mortgagee credit for any actual expenditure, made upon the land, having regard to the fact that the land was in the cultivation of burgadar and the said mortgagee has only been charged with half of the produce which he would obtain leaving to the burgadar the other half in consideration of his going to the taluk and expenses of the actual work of cultivation.

3. On the whole, the decree appealed from appears to be fair and just and this appeal fails and is dismissed with costs.

Mukerji, J.

4. I agree.