Privy Council Appeal No. 13 *of* 1936.

Raja Bahadur Dhanarajagerji - - - - *Appellant*

v.

Raja Panuganti Parthasarathi Rayanim Varu and others *Respondents*

Raja Panuganti Parthasarathi Rayanim Varu and another *Appellants*

v.

Raja Bahadur Dhanarajagerji and others - - - *Respondents*

Raja Panuganti Parthasarathi Rayanim Varu and another *Appellants*

v.

Raja Bahadur Dhanarajagerji and another - - - - *Respondents*

Consolidated Appeals.

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 10TH FEBRUARY, 1938.

Present at the Hearing:
LORD RUSSELL OF KILLOWEN
LORD ALNESS
LORD ROMER
SIR SHADI LAL
SIR GEORGE RANKIN

[*Delivered by* SIR GEORGE RANKIN.]

In this case three appeals have been consolidated. They arise out of an account taken in the Court of the Subordinate Judge of Nellore under an Order of His Majesty in Council dated the 25th June, 1924, decreeing a suit for redemption of a mortgage. The suit had been brought in that Court on 27th August, 1915, by three persons who had acquired the rights of the mortgagor the then Raja of Kalahasti in the suit lands under an execution sale in February, 1915. One of them has since died but they may be referred to collectively as " the plaintiffs ". The person sued as mortgagee was the first defendant, and the Raja of Kalahasti was the second. As the latter was only a formal party and took no part in contesting the suit, the first defendant, though now dead and represented by his son, will be referred to herein as the defendant.

Execution proceedings under the Order in Council were begun by execution petition No. 63 of 1924 filed on the 1st October, 1924, in the Court of the Subordinate Judge, and on the 22nd December of that year, a commissioner was appointed to ascertain the mesne profits. He reported on the 14th March, 1929, and the Subordinate Judge gave his decision on the 26th August, 1929. Both sides appealed

to the High Court, the defendant's appeal being No. 362 of 1929 and the plaintiffs' appeal No. 161 of 1930. The High Court dismissed the plaintiffs' appeal, and the defendant's appeal was successful only in part. Hence the defendant has brought one appeal to His Majesty (C.M.P. No. 1717 of 1933) and the plaintiffs have brought two (C.M.P. No. 3685 of 1933 and C.M.P. No. 2984 of 1933).

The transaction giving rise to the litigation is represented by two instruments dated the 4th August, 1908. One was a conveyance by which the then Raja of Kalahasti conveyed certain lands to the defendant for the sum of 6 lakhs; by the other the defendant agreed to sell the said lands back to his vendor for 6 lakhs on condition that this sum was paid on the 31st August, in the years 1912, 1913 or 1914. It was stipulated that if the 6 lakhs were not paid before the 31st August, 1914, the agreement for re-purchase should not be operative, but that if it was paid on the 31st August, 1914, the defendant should refund all rents and profits as from the 1st July, 1914.

The plaintiffs maintained that the transaction of the 4th August, 1908, was a mortgage in the form of a conditional sale, and that the 6 lakhs had in conformity with the contract been duly tendered to the defendant, who had refused to reconvey. They claimed accordingly a decree for redemption, and they asked *inter alia* to recover Rs.80,000 for mesne profits for the Fasli year, 1324, that is, from the 1st July, 1914 to 30th June, 1915, together with future mesne profits to the date of delivery of possession. The case of the defendant was that the transaction was not a mortgage and that tender of the purchase money under the contract for re-purchase had not been made timeously or in accordance with the terms agreed upon.

At the trial the learned Subordinate Judge found for the plaintiffs, holding that the transaction of 1908 was a mortgage. He made a preliminary decree for redemption to the effect that if the plaintiffs paid into Court 6 lakhs before the 5th March, 1919, the defendant should re-convey the property and should pay Rs.60,000 on account of past mesne profits for Fasli 1324, together with certain costs. This decree was dated the 5th October, 1918. He refused to award mesne profits to the plaintiffs for any year after Fasli 1324, giving as his reason that though the 6 lakhs had been tendered in 1914, the plaintiffs had not deposited that sum in Court. He arrived at the figure Rs.60,000 upon what he described as vague oral evidence, no accounts having been filed before him. Though he described the materials as crude, he said that "on the whole, I think it safe to fix the mesne profits for Fasli 1324 at Rs.60,000". The sum of 6 lakhs was brought into Court on 5th March, 1919, and a final decree for redemption was passed on 7th October, 1919.

The defendant appealed from both decrees to the High Court at Madras whose decree is dated 24th February, 1921.

The High Court found in his favour that the transaction of the 4th August, 1908, was not a mortgage, but held against him that the conditions entitling the plaintiffs to re-purchase had been fulfilled, and that he must re-convey the property. Although the question of the amount of mesne profits does not appear to have been discussed in the judgment, the decree of the High Court adopted the figure of Rs.60,000 (applied by the Subordinate Judge to the first year from the 1st July, 1914) and applied it to the whole period from that date until delivery of possession by the defendant. It also directed that the plaintiffs should pay interest on the 6 lakhs at 6 per cent. per annum from the 1st September, 1914, to the date of deposit.

The plaintiffs do not appear to have been minded to contest the matter further, but the defendant appealed to His Majesty, contending that the plaintiffs had not fulfilled the conditions which entitled them to re-purchase the land, and also that the right of re-conveyance was personal to the Raja of Kalahasti, and did not pass to any assignee. On the 19th June, 1924, judgment was delivered by Lord Blanesburgh on behalf of the Board. From this judgment it appears that the sole question ultimately argued on the defendant's behalf was the question whether the transaction was or was not a mortgage. The opinion of the Board was to the effect that "a mortgage and a mortgage only was in the direct contemplation and intention of both parties to the transaction". On this point they agreed with the conclusion of the Subordinate Judge and disagreed with the High Court. Their advice to His Majesty was expressed as follows:—

> "The Respondents in Their Lordships' judgment are entitled to a redemption decree. They are chargeable with interest at the rate of 6 per cent. per annum from the 1st September, 1914, down to the date when the six lakhs were paid into Court. The Appellant will be entitled to the interest earned by that sum since it was so paid in."
>
> "On the other hand, the Appellant must account to the Respondents for mesne profits of the properties as from the 1st of July, 1914, until actual delivery of possession to the Respondents. The order of the High Court should be discharged and with these variations the decree of the learned Subordinate Judge should, in Their Lordships' opinion, be restored."

The terms of the Order in Council ran as follows:—

> "Their Lordships do this day agree humbly to report to Your Majesty as their opinion (1) that the decree of the High Court of Judicature at Madras, dated the 24th day of February, 1921, ought to be discharged and that with the following variations the decrees of the Court of the Subordinate Judge of Nellore, dated the 5th day of October, 1918, and the 7th day of October, 1919, ought to be restored; (2) that it ought to be declared that the Respondents are chargeable with interest upon the mortgage money advanced at the rate of 6 per cent. per annum from the 1st day of September, 1914, to the 5th day of March, 1919, upon which date the said mortgage money was paid into Court; (3) that it ought to be further declared that the appellant is entitled to the interest earned by the said mortgage money since it was so paid into Court; (4) that the Appellant ought to account to the Respondents for the mesne profits

of the property as from the 1st day of July, 1914, until the actual delivery of possession to the Respondents; and (5) that there ought to be paid by the Appellant to the Respondents their costs of the Appeals to the said High Court, their costs of this Appeal incurred in the said High Court and the sum of £561 17s. 6d. for their costs thereof incurred in England."

It has already been explained that the disputes now before the Board arise out of the accounts which have been taken under this Order. Delivery of possession was given by the defendant to the plaintiffs in December, 1924, and the computation of mesne profits is now the main subject of dispute. The first question is whether, for the first year from 1st July, 1914, (Fasli 1324), the figure of Rs.60,000 arrived at by the Trial Judge is to be accepted, or whether the Order in Council requires that a fresh account should be taken to ascertain the mesne profits for the first year, no less than for the other years up to the date of delivery of possession. For the defendant it is contended not only that the figure of Rs.60,000 should be accepted for the first year, but that it should likewise, on the strength of the High Court's decree be accepted for six years thereafter. This last mentioned contention must, in their Lordships' view be rejected, notwithstanding that the Board's judgment does not refer expressly to the matter, since the decree of the High Court was set aside. The question as to the first year, however, presents some difficulty. By the Order in Council, the decree of the Subordinate Judge is restored with the following variation; "that the appellant ought to account to the respondents for the mesne profits of the property as from the 1st day of July, 1914, until the actual delivery of possession to the respondents." This must *prima facie* be read as directing the account to begin as from the 1st day of July, 1914. It is said, however, that this meaning should give way to the consideration that their Lordships cannot, without difficulty, be supposed to have overruled the Trial Judge on the question of the first year's profits without mentioning the matter specifically. While there is no little force in this contention, it may also be considered that if it had been intended that the accounts for the first year should not be gone into, mention of the 1st July, 1914, would not have been made, unless accompanied by a statement to the effect that the accounts for the first year already taken were not to be disturbed. Moreover, it is not clear that the finding of the Trial Judge amounted, in the strict sense, to the taking of an account. The weight to be given to such considerations must depend on all the circumstances of the case, as well as on the exact language of the ordering portions of the decree of the Subordinate Judge and of the Order in Council. Their Lordships have, on this point, reached the conclusion that the contention of the plaintiffs must be accepted, that the first year (Fasli 1324) cannot be excluded from the account and that the mesne profits for that year must be computed afresh. It will not, however, be necessary to require the High Court to pursue any further investigation

of the accounts in order to include the year 1324, learned Counsel on both sides having agreed before their Lordships to accept for that year the average of the first nine figures in column 10 of the account contained in the High Court's judgment. This figure, with interest thereon, to the 26th August, 1929 (the date of the order of the Subordinate Judge upon the accounts), as in the case of the other years, must be added. The defendant will, however, get credit for Rs.60,000 the sum paid by him in respect of Fasli 1324, with counter interest from the date of payment or satisfaction (11th August, 1920), as in the case of similar items already included in the account.

The plaintiffs further contend that, having established that the transaction was a mortgage and that the mortgagee did not re-convey notwithstanding the tender of the mortgage money, they are entitled under clause (*i*) of section 76 of the Transfer of Property Act, as it stood in 1914, to require the defendant to account for the gross receipts from the property from 1st July, 1914, until the day in December, 1924, when he made over possession to the plaintiffs. This contention was first raised six months after the date of the Order in Council by an application in execution (No. 22 of 1925) filed on 18th January, 1925. Without discussing the question whether, had this relief been asked for by the plaint, it could have been refused, their Lordships are of opinion that the High Court were clearly right in taking the view that the Order in Council directing the defendant to account for the mesne profits of the property cannot be read as requiring him to account for the gross receipts. The decree of the Subordinate Judge, which is restored with variation, and the Order in Council itself must be taken to intend the meaning given to the phrase "mesne profits" by clause 12 of section 2 of the Code of Civil Procedure. This contention of the plaintiffs which is the basis of their appeal, C.M.P. 2894 of 1933, must, therefore, be rejected.

Their Lordships are not of opinion that the plaintiffs can succeed upon any of the remaining contentions raised by them. Both sides have sought to induce the Board to interfere with the figures arrived at by the High Court as representing the mesne profits of the years between 1325 and 1333; but their Lordships are unable to discover any question of principle or of law upon which the High Court have gone wrong. With great care the learned Judges have arrived upon difficult material at a conclusion which appears to be reasonable and convincing. They found it possible to obtain reliable figures representing the gross demand attributable to the suit lands for the Fasli years 1334 and 1335, and they have taken the average of these two years as being, in their judgment, the best basis of computation afforded by the evidence. They have arrived after close scrutiny of detail at a reasonable figure in respect of deductions to be made for each year under different heads. Such figures can

always be criticised in detail but no case has been made out calling for revision of these figures by the Board.

The plaintiffs having alleged that the defendant had acted fraudulently and improperly in letting lands to tenants, the High Court has permitted independent proceedings in execution to continue as to this claim; and their Lordships are unable to discover that the plaintiffs have any grievance either as to this matter, or as to the refusal of the High Court to entertain claims for further mesne profits in respect of premiums received from new tenants.

The defendant has objected that he should have been allowed a deduction of ten per cent. for collection charges, independently of his establishing this figure by evidence, [*Secretary of State for India in Council* v. *Saroj Kumar Acharjya Choudhury* (1934) L.R. 62 I.A. 53], but it appears that it was thought to be to his interest in the Courts below to establish specific figures showing the cost of collection. This indeed was the form given to his contention in his Case on this appeal. If the result of this endeavour has been somewhat unfavourable to him, their Lordships do not think it right that the High Court's order should be varied on that account. His contention that interest should not have been allowed upon mesne profits is clearly answered by the definition in the Code, sec. 2 (12).

There remains, however, one matter upon which the defendant must succeed. The Order in Council (in agreement with the High Court's decree) finally determined that the plaintiffs were chargeable with interest at 6 per cent. per annum from the 1st September, 1914, to the 5th March, 1919, the date upon which the six lakhs were paid into Court. This interest amounted to Rs.1,62,400 as on the 5th March, 1919. In their Lordships' view it is only right as a matter of proper accounting, that counter interest should be charged against the plaintiffs on this sum if, on the other side of the account, they are to be credited with interest upon the whole of their claim from 1914 onwards. There is no distinction between this item and the items for which the plaintiffs admit that counter interest must be computed, by reason of payments received by them on account of their claim. If the two sides of the account are to be made out separately, and a balance struck only at the end, it is necessary that each side should be comparable with the other. The account in this case runs from 1914 to 1929. The learned Judges of the High Court seem to have misunderstood the defendant's contention on this point. The Order in Council directed that the 6 lakhs should carry interest for a given period. It was not necessary that it should direct how this credit should be treated in account. This, however, is the only point on which, in their Lordships' view, the defendant's appeal can be accepted.

Their Lordships will humbly advise His Majesty that the appeal of the defendant should be allowed in part and that he should have credit in account for counter interest at

6 per cent. per annum on the sum of Rs.1,62,400, from the 3rd March, 1919, to 26th August, 1929. Also that of the plaintiffs' appeals, C.M.P. 2894 of 1933 should be dismissed and C.M.P. 3685 of 1933 should be allowed in part; and that in respect of the Fasli year 1324, mesne profits should be computed, based upon the average of the nine years, 1325 to 1333, as set forth in column 10 of the account above mentioned, together with interest to 26th August, 1929; proper credit being given for what the plaintiffs had received in respect of Fasli 1324. The sum of Rs.6,23,665-1-0 in the first and second clauses of the order of the High Court should be adjusted accordingly but save as aforesaid the order of the High Court should stand including its provisions as to costs. There will be no order as to the costs of this consolidated appeal.

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In the Privy Council.

RAJA BAHADUR DHANARAJAGERJI

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DELIVERED BY SIR GEORGE RANKIN

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