

**Sant Ram Misir Vs. Ram Bilas Misir**

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**SooperKanoon Citation :** [sooperkanoon.com/461754](http://sooperkanoon.com/461754)

**Court :** Allahabad

**Decided On :** May-01-1944

**Reported in :** AIR1944All283

**Appellant :** Sant Ram Misir

**Respondent :** Ram Bilas Misir

**Judgement :**

**Sinha, J.**

1. This is a defendant's appeal arising out of a suit for accounts under Section 33, U.P. Agriculturists' Relief Act. The mortgage was made on 25th October 1933, for a sum of Rs. 1950 by Ram Bilas and others in favour of Sant Ram. Various defences were raised to the action with which we are not concerned at this stage. Part of the property was in possession of tenants and it is admitted on both sides that the rent realized by the mortgagee from them was Rs. 35-15-6 per year. There is no controversy as regards this. The dispute is as regards the portion of the profits of the mortgage which was actually in the possession of the mortgagee himself. The learned Munsif came to the conclusion that the basis of calculation must be the letting value of the plots and he declared a sum of Rs. 1582-7-0 as due to the mortgagee. On appeal by the plaintiffs the learned District Judge has dissented from that principle and has held that the true basis of calculation must be 'the usufruct minus the costs of production.' He finally came to the calculation

that Rs. 975 was due to the mortgagee on proper accounting. The mortgagee has come before us in second appeal. His main contention is that the basis of calculation adopted by the learned District Judge does not receive any sanction from the provisions of Section 9, U.P. Debt Redemption Act, which is the only relevant provision of law on the point. Section 9 of the Act says that

in the case of a mortgagee with possession, the net profits realized by the mortgagee or which, with the exercise of ordinary diligence, might have been realized by him, shall determine the amount, if any, due by the debtor....

2. It is contended that Section 2(1) of the Act en-joins upon the Courts to give the same meaning to words and expressions in the U.P. Debt Redemption Act which they receive under the U.P. Land Revenue Act, 1901, or the U.P. Tenancy Act, 1939. It is therefore argued that in order to find a true solution of the question involved in this case we have to refer to Section 233(2), U.P. Tenancy Act, which provides that the valuation of sir, which is not let, and of khudkhasht which has been cultivated continuously for three years at the date of the suit shall, for purposes of calculating the amount divisible among the cosharers as profits, be made at the rates applicable to ex-proprietary tenants....

3. The learned Counsel for the appellant has however lost sight of the fact that the question of the rate applicable to ex-proprietary tenants arises only if we do not know or there is no method of knowing what the actual profits have been. If we know or have a method of knowing the precise amount which the mortgagee has realised out of the land in his possession it is those profits which must form the basis of calculation under Section 9, U.P. Debt Redemption Act, or Section 38, U.P. Agriculturists' Relief Act, or even Section 233 (2), U.P. Tenancy Act of 1939. The learned Counsel for the appellant has strenuously contended that it will be taxing the mortgagee for his skill and extra labour if the basis of calculation is the one which has been accepted by the learned District Judge. Skill and labour should not be taxed, they should, as far as possible, be encouraged, we should be anxious not to put a premium on negligence. To hold that the mortgagee in this case has special claims upon the consideration of the Court is to give him credit for what was, under the law, his obvious duty under the Transfer of Property Act.

Every mortgagee is expected under Section 76 (a), T.P. Act, to manage the property as a person of ordinary prudence would manage if it were his own or under Clause (b) 'to use his best endeavours to collect the rents and profits thereof.' If this is the law we cannot say that a mortgagee who has taken pains in the management of the property entrusted to his care by the mortgagor has done anything more than what the law required him to do. On a consideration of all the facts we have come to the conclusion that the basis of calculation adopted by the learned District Judge is a rational and sound basis.

4. It has also been contended by the learned, counsel for the appellant that the learned District Judge has adopted an arbitrary method in making the calculation. In considering this argument we have to bear in mind certain provisions of the Transfer of Property Act. It is no doubt true that at the date of the transaction the mortgagee could never think that he would be called upon to render accounts, but we have to take the law as it is. Section 33, U.P. Agriculturists' Relief Act, has clearly recognized the right of the mortgagor to claim accounts and it has been held by a Full Bench of this Court in Mohammad Ishaq Khan v. Rup Narain ('31) 18 A.I.R. 1931 562, that under the Transfer of Property Act this right cannot be taken away even if there is no covenant in the mortgage deed allowing him such a right. Once, therefore, the right to claim accounts is recognized by the Legislature all the provisions relating to the liability of the mortgagee as defined by Sections 76(g) and (h), T.P. Act, come into operation. Section 76(g) imposes upon the mortgagee an obligation to keep clear, full and accurate accounts. Indeed their Lordships of the Privy Council in Shadi Lal v. Lal Bahadur , and the Full Bench decision in Mohammad Ishaq Khan v. Rup Narain ('31) 18 A.I.R. 1931 562 emphasized the serious consequences to the mortgagee in the event of his failure to comply with the provisions of the law. If this is so, he cannot seriously challenge the basis of calculation adopted by the learned District Judge, nor can he impugn the method which he has chosen for arriving at the precise amount of profits. In the result, we are of opinion that the decree of the learned District Judge is correct and we dismiss this appeal, but under the circumstances we make no order as to costs.

