

Vairappa thevan and anr. Vs. Subbiah thevan and ors.

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SooperKanoon Citation : sooperkanoon.com/811228

Court : Chennai

Decided On : Dec-20-1917

Reported in : 44Ind.Cas.251

Judge : Seshagiri Aiyar and ;Kumaraswami Sastri, JJ.

Appellant : Vairappa thevan and anr.

Respondent : Subbiah thevan and ors.

Judgement :

1. The previous suit was for redemption. A preliminary decree was passed on the 30th September 1909, which gave a month for the payment by the mortgagor. The payment was actually made on the 29th October 1909. The final decree was passed on the 13th December 1912, The present suit is for mesne profits between the 29th October 1909 and the date of the suit. Both the lower Courts, following Sakari Datta v. Sheikh Ainuddy 6 Ind. Cas. 336 gave plaintiff a decree.

2. In second appeal Mr. Bashyam Aiyangar argued that the claim is barred by res judicata. His contention is that as Order XXXIV, Rule 10, provides for an adjustment of the amount due on the occasion of passing the final decree, the relationship of mortgagor and mortgagee subsists till then and the only remedy open to the mortgagor is to claim a settlement of accounts in the passing of the final decree and not to sue separately for the mesne profits. The question is whether the mortgagor is compellable to adopt this course indicated by the learned

Vakil.

3. It was recently held by a Skill Bench of this Court, that a claim for future mesne profits can be sued on separately. It is not seriously disputed that a decree for redemption is practically a decree for possession, subject to the condition of paying a certain amount fixed by the Court. Therefore when that amount has been paid, the mortgagor is entitled to possession and the retention of possession by the mortgagee is that of a wrong-doer. This is the view taken in *Sakari Daita v. Sheikh Ainuddy* 6 Ind. Cas. 336 and we agree with that decision. Under Order XXXIV, Rule 1(a), the moment the amount ascertained by the preliminary decree is paid into Court, the mortgagor acquires a right to the property. There is nothing more to be done by way of adjustment. Moreover, in this case, the possession of the property was to be in lieu of interest. Therefore no question of further accountability arises. Vide Section 77 of the Transfer of Property Act.

4. Our attention was drawn to a decision of *Abdur Rahim and Bakewell, JJ.*, in *Papla Chakrapani Chettiar v. Ramaswamy Thenkondan* 42 Ind. Cas. 230. The learned Judges held in that case that the Court had power, even after the preliminary decree, to adjust the rights of the parties. It was neither argued nor decided that the mortgagor is bound to claim this adjustment and that if he did not do so, his right to mesne profits will be barred as *res judicata*. *Rukhminibai v. Venkatesh* 9 Bom. L.R. 958 which was strongly relied on by the learned Vakil for the appellants, was a case in which tender was before decree. No payment was made under the decree and consequently the present question is unaffected by that decision.

5. The other cases quoted do not decide that the mortgagor's only remedy is to claim an adjustment before the passing of the final decree.

6. We think the decision of the lower Appellate Court is right and dismiss the second appeal with costs.