

**Prosanna Kumar Halder Vs. Girish Chandra Ghose**

**LegalCrystal Citation :** [legalcrystal.com/875110](http://legalcrystal.com/875110)

**Court :** Kolkata

**Decided On :** Apr-10-1933

**Reported in :** AIR1934Cal149

**Appellant :** Prosanna Kumar Halder

**Respondent :** Girish Chandra Ghose

**Judgement :**

1. This is an appeal by the defendant mortgagee in a suit in which the plaintiffs sought to exercise their right of redemption in regard to five usufructuary mortgages, four of them executed in the year 1898, and the fifth in the year 1904, by one Dwarika Nath Ghose, the predecessor-in-title of the plaintiffs. According to the plaintiffs the mortgagee was in possession of the mortgaged properties consisting of several items, in lieu of interest as stipulated in the mortgage bonds; the mortgagee in possession was to get interest on the mortgage money at the rate mentioned in the mortgage bonds, if the mortgagor failed to deliver possession of the mortgaged properties; there was the further stipulation contained in the mortgage bonds that the mortgagee was to pay the rent payable in respect of the mortgaged properties to the landlords concerned, out of the profits derived from the mortgaged properties. The allegation of the plaintiffs was that rents payable by the defendant were not paid by him. There was a prayer made in the suit for redemption of the mortgaged properties after account has been taken of the dues of the parties in respect of the five mortgages in suit according to the stipulation contained therein. The main defence of the defendant was that he did not obtain possession of some items of property covered by the mortgages in suit and that he was therefore entitled to get interest on account of the mortgagor having failed to give him possession, or having dispossessed him from a portion of the properties mortgaged on the proportionate amount of the mortgage money which was charged on the properties from which there was dispossession. In regard to rents payable to landlords the defendant's case before the Court was that he had paid the same in terms of the mortgage bonds and that the plaintiffs could not get credit for amounts payable as rents unless they proved that payment was made by them.

2. The Court of appeal below has held that the fact of dispossession or failure to put the mortgagee in possession of a portion of the properties mortgaged was made out, but that at no time within the long period of 21 years after the alleged dispossession did the defendant take any step to require the mortgagor to give any additional security for the mortgage-debt and did not give for the mortgage money. It was clear therefore that the mortgagee remained satisfied with the diminished security in his possession and having acquiesced it was not therefore open to him to claim interest in lieu of the rents and profits of the portion of the mortgaged properties of which he was not in possession. The position indicated by the learned Judge in the Court below,

that the mortgagee, if he does not take steps in time, calling upon the mortgagor to furnish additional security by way of compensation and for the purpose of reimbursing himself to the extent of his loss, if any, the mortgagee would be deemed to have acquiesced in the diminished security, and could not therefore claim interest on the mortgage money on account of dispossession from a portion of the mortgaged premises, is amply borne out by authority of the decision of their Lordships of the Judicial Committee of the Privy Council in the case of Raja Partab Bahadur Singh v. Gajadhar Baksh (1902) 24 All 521. The question arising for consideration next is whether the contention of the defendant-appellant in regard to the rents payable to the landlords in respect of the mortgaged properties could be given effect to. It appears to be in consonance with principles of justice, as also with the equities involved in the case before us that the plaintiffs cannot get credit for any rent payable on account of the mortgaged properties which were not actually paid by them or the predecessor-in-title, Dwarka Nath Ghose, by whom the mortgages in suit were executed.

3. A further question requires consideration in view of the cross-objection preferred by the plaintiffs-respondents in the appeal. It would appear from the direction given by the Courts below in the matter of accounting that the right of the mortgagors to get credit for the usufruct of the properties in possession of the mortgagee with interest thereon at the current market rate which the plaintiffs seek to redeem, has not been kept in view. In our judgment there can be no doubt that it may be found in the course of accounting that the several mortgages stood redeemed one by one, at different dates, in view of the appropriation of profits by the mortgagee so far as the properties in his possession were concerned. The position taken up by the plaintiffs-respondents in this behalf in their memorandum of cross-objections before this Court has to be accepted. In the above view of the case, the decree passed by the Court below requires modification, and we direct that a self-contained decree be prepared in this Court giving effect to our decision.

4. The plaintiffs' suit is disposed of in the manner following: The plaintiffs are entitled to a decree for redemption. An account is to be taken of the amount which the plaintiffs may have to pay to the defendant on the footing of the five mortgages mentioned in the plaint; the defendant has to account for the usufruct or the profits out of the properties in his possession on the strength of those five mortgage bonds. As to the rents payable to the landlords in respect of the mortgaged properties, the accounting will be on the basis that the plaintiffs are not entitled to get credit for any amount which has not been paid by them or by their predecessor-in-interest, the original mortgagor, Dwarka Nath Ghose. In order to get credit for rents in respect of the mortgaged properties, the plaintiffs are to establish what amount was actually paid by them or their predecessor-in-interest, and they will get credit for that amount, and not for the amount of rent which should have been paid by the defendant, as mentioned in the order portion of the judgment of the trial Court. The costs of the litigation up to the present stage, including the, costs in the appeal and the cross-objection, will be awarded by the trial Court to the parties concerned, according to the discretion of that Court. The appeal and the cross-objection filed by the respondents in this appeal are allowed to the extent indicated above, the decree of the Court below being modified.