Dara vs Mathura on 28 March, 1951

Equivalent citations: AIR1951ALL643

JUDGMENT

Malik, C.J.

1. I agree with the judgments prepared by my learned brothers Misra & Kidwai JJ. that these applns. should be dismissed with costs.

2. A mtgee. Subject to such terms as may have been agreed upon between him & the mtgor., cannot be made liable for anything more than the rent realized by him if he has let out the land to tenants at a reasonable rate. The mtgor. cannot complain that the land was let out to tenants & was not cultivated by the mtgee. himself. If the mtgee. undertakes to cultivate the land it is not merely the land but the seeds, manure etc. used by him & his labour that contribute to the profits made. I have already pointed out in the case of Surju Prasad v. Randhir Singh, 1945 O.A.H C.B. 55 that a tenant not only provides seeds & manure but also gives a lot of his time and labour in ploughing & watering the field & in sowing the crops, & he also takes the risk of the possible failure of crops. It will be most unreasonable to give the mtgor. the whole of the profits made by the mtgee. from such land, as if it was the land alone that had contributed to the making of the entire profits. The mtgor. can reasonably claim from the mtgee. the same amount which the mtgee could, with the exercise of ordinary diligence, have realised by letting out the land to tenants.

3. Rent payable by various classes of tenants vary. The most favourable rate of rent at which the land could be let out must be the 'fair occupation rent' at which profits must be worked out. The circle rates which are periodically prepared by the Revenue Dept. can certainly be treated as relevant evidence. What is the amount which the mtgee. would have realised if he had let out the land on the best terms available must, in each case, be a question of fact to be decided by the Ct. on the materials on the record.

4. The question has been fully dealt with by my learned brothers & I have already expressed my views in the cases of Surju Prasad Singh, (1945 O. A. H. C. B. 55) mentioned above and Kashi Prasad v. Raghunandan, A. I. R. (35) 1948 ALL. 344: (I. L. R. (1948) ALL. 310), I agree, therefore, with the order proposed.

Kidwai J.

5. These two applns. arise out of two proceedings Under section 12, U. P. Agriculturists' Belief Act, instituted by Dara, appct. against Mathura.

6. Permanand, the father of Dara, executed two mtge. deeds in favour of Jaggoo, father of Mathura, the first was a possessory mtge. deed executed on 23-7-1904, to secure repayment of a sum of Rs. 70 & the second was a simple mtge executed on 8-12-1920, in consideration of Rs. 135,

7. On 23-8-1924, Permanand executed a third mtge. deed with possession in favour of Jaggoo for Rs. 400. Rs. 165 were received in cash, Rs. 70 were credited towards the first mtge. and Rs. 165, which included interest amounting to Rs. 30 were credited towards the second mtge. Plots Nos. 1471 & 1576 measuring l Bigha 8 Biswas of under, proprietary land in Balamau, district Hardoi, were mortgaged.

8. On 8-8-1943, Permanand, being then dead, Dara applied Under section 12, U. P Agriculturists' Relief Act, for an order against Jaggoo for redemption of this mtge. without payment on the ground that the deft had, by the appln. of Section 9, Debt Redemption Act, been paid off out of the usufruct. This was numbered as suit No. 199 of 1943.

9. Jaggoo pleaded that the income of the mortgaged property was so small that it was not even sufficient to satisfy the annual interest calculated at 4 1/2 percent, the rate fixed by Section 9, Debt Redemption Act, & that consequently no portion of the principal had, uptil then been paid.

10. On the same date as he filed suit no. 199, Dara filed another appln. (Suit No. 200 of 1943) for an order for redemption without any payment of another possessory mtge. granted by Permanand in favour of Jaggoo on 25-2-1916, in consideration of a sum of Rs. 200 The plots covered by this mtge, are under proprietary plots No. 6 & 1799, measuring l Bigha 17 Biswas, in village Balamau.

11. Jaggoo pleaded in this also that the profits were not sufficient to satisfy the annual interest & that the whole of the principal remained due. He also set up a deed of further charge dated 3-8-1928, for Rs. 100 which carried interest.

12. The two cases were tried together & were disposed of by one judgment. The Ct. of first instance, the Revenue officer of Hardoi calculated the profits of the land in the possession of the mtgee. in each case at three times the circle rate of rent, & deducted the under proprietary rent there from. He also calculated interest on the principal at 4 1/2 per cent & came to the conclusion that Rs. 220 remained due in respect of the mtge. involved in suit No. 199 & that a sum of Rs. 74 remained due in respect of the mtge. & the deed of further charge, which he held proved, in suit No. 200. He accordingly ordered redemption in both the suits on payment of the sum found due within three months.

13. Jaggoo appealed. The learned Civil Judge held that there was no justification for calculating profits at three times the circle rate of rent. He consd. that profits should be assessed an equal to the rent at circle rates, deducting the under proprietary rent there from. On this calculation he held that the entire principal remained due in respect of both the mtges. & of the deed of further charge. In suit No. 199, however, he found that Rs. 30 consisted of the interest on the second mtge. & he deducted it from the principal, adding Rs. 22 as interest at 4 1/2 percent on Rs. 135 from 8-12-1920, to 25-8-1924. He accordingly allowed redemption in suit No. 199 on payment of Rs. 392 & costs & in

suit No. 200 on payment of Rs. 364 & costs, inclusive of interest on the deed of further charge. Six months' time was allowed for the deposit of the sums found due.

14. Dara applied Under section 115, C. P. C. in both the cases & claimed that the method adopted by the trial Ct. for calculating profits was the correct method. Jaggoo died during the pendency of the applns. & is now represented by Mathura, his son.

15. The two applns. came up for hearing before our learned brother Desai, J. who found that there was some conflict between various decisions of this Ct. his own view being that the method adopted by the lower appellate Ct. was correct. He refd. the two applns. to a Bench so that the whole law might be reconsd. The Bench before which the applns. came up thought it necessary to have the law settled & refd. the applns. to a F. B.

16. Mr. Tankha, who appeared for the applts. placed the entire case law on the subject before us. A perusal of the authorities reveals that there are two distinct sets of views. According to one set of views, in the case of agricultural land in the actual occupation of the mtgee. the actual price of the produce, deducting there from the costs of production, must be consd. to be the profits realised by the mtgee. & according to the other it is only a "fair occupation rent" that can be consd. to be the net profits of the mortgaged property. In some of the cases of the first series it is laid down that if there is no evidence of the actual produce, profits should be calculated at 5 times the circle rate of rent & costs of cultivation should be deducted there from. Other Judges have expressed the view that, in such cases, the rent at circle rates should be taken as the profits. I shall proceed to consider the various decisions one by one but before doing so it is necessary to refer to the relevant provisions of the various enactments bearing on the Subject.

17. Section 9 (l), U. P. Debt Redemption Act, reads as follows :

> "In a suit to which this Act applies or in amending a decree under the provisions of Section 8, the Ct. shall notwithstanding anything to the contrary in any law, decree or contract or in any agreement purporting to close past transactions determine the principal & take into account all sums paid by or on behalf of the debtor & in the case of a mtge, with possession, the net profits realised by the mtgee. or which with the exercise of ordinary diligence might have been realised by him, & shall determine the amount, if any, due by the debtor in accordance with the provisions of the following Sub-sections."

18. What has, therefore, to be determined in the case of a mtge. with possession is "the net profits realised by the mtgee. or which with the exercise of ordinary diligence might have been realised by him ..."

19. The expression "net profits" is nowhere defined but Section 2 (l), U. P. Debt Redemption Act, says :

> "Subject to the provisions of the following Sub-sections, all words, & expressions which are defined or explained in the United Provinces Land Bevenue Act, 1901, or the United Provinces Tenancy Act, 1939, shall have the meanings assigned to them therein."

20. The learned Advocate for the oppositeparties contended that the expression "net profits" is explained in Section 233, D. P. Tenancy Act, which is as follows :

> (1) In a suit for settlement of accounts Under section 230 or Section 231 the collections made by a co-sharer shall in the absence of any custom or contract to the contrary, be treated as having been made on behalf of all the co-shartrs.
>
> (2) In any such suit, the valuation of sir which is not let and of khudkasht which has been cultivated "continuously for three years at the date of the suit shall, for the purposes of calculating the amount divisible among the co-sharers as profits, be made at the rate applicable to ex-proprietary tenants, provided that if such sir is let the rent payable by the tenant thereof shall be accepted as the fair valuation, unless the Ct. for reasons to be recorded decides to make the valuation in some other manner."

21. It will be seen that both the Sub-sections of the section are limited to suits for accounts Under sections 230 & 231 of the Act, & the rule for valuation of sir in Sub-section (2) of Section 233 is laid down expressly only for the purpose of determining the profits of sir & khudkasht for the purpose of such suita. This section is, therefore, of no use in determining the meaning of the expression "net profits" though it does indicate that, in calculating profits as between the proprietors, it is not the value of the produce, less the costs of collection, that is to be consd. but the rent that the sir-holder would be liable to pay, were he a tenant of the land which he holds as sir. There is no other definition or expln. of "net profits" or profits either in the Land Revenue Act or in the Tenancy Act.

22. Section 76(b), T. P. Act does, however, have an important bearing on this part of the case. It reads as follows :

> ".When, during the continuance of the mtge. the mtgee. takes possession of the mortgaged property, his receipts from the mortgaged property or, where such property is personally occupied by him, a fair occupation rent in respect thereof, shall, after deducting the expenses (pro-perly incurred for the management of the property & the collection of rents & profits & the other expenses) mentioned in Clauces (c) & (d), & interest thereon, be debited against him in reduction of the amount (if any) from time to time due to him on account of interest & so far as such receipts exceed any interest due in reduction or discharge of the mtge.-money; the surplus, if any, shall be paid to the mtgor."

23. Thus under the ordinary law if a mtgee. is in possession of the mortgaged property & occupies a portion of it personally, he is only to be accountable for "a fair-occupation rent in respect' therefore".

Of course, if this is contrary to the terms of Section 9, U. P. Debt Redemption Act, it cannot have effect given to it. The only words to which, it is contended, that it is contrary are the words "net profits realised" since it is contended that these words mean the profits which have been actually received no matter by what process.

24. Before net profits can be determined, it must be ascertained what is the mortgaged property because it is only the profits of such property that can be taken into account. Rights in agricultural land may be divided into two main heads : the right of ownership, or the proprietary right & the right of cultivation, or tenants'' right. The distinction between the rights of an owner & the rights of an occupier, at least with regard to houses situated on portions of the mortgaged land has been clearly brought out in Kanhaiya, Lal v. Sheva Lal, A. I. R. (23) 1936 ALL. 14 : (58 ALL. 376) and Umrao Singh v. Kacheru Singh, A. I. R. (26) 1939 ALL. 415 : (I. L. R. (1939) ALL, 607 F. B).

25. In Kanhaiya Lal v. Sheva Lal, A. I. R. (23) 1936 ALL 14 : (58 ALL. 376) the question was whether the house occupied by a Zamindar passed on an auction sale of the share of that zaminder & the learned Judges say :

> "When Mt. Jasoda was a co-sharer, she had a proprietary title in three things : (1) a joint right in the site ; (2) a proprietary right in miterials; & (3) a right of residence in the house on that site. By the auction sale, we consider that only No 1 was transferred that is, she lost her undivided share in the village abadi. But we do not consider that she lost her proprietary rights in either (2) or (3). In our opinion the sale of her undivided share in the village and in the abadi could not lessen the proprietary title which she had in the materials of the house & could not lessen her right of residence in that site . . ."

26. In Umrao Singh v. Kacheru Singh, A. I. R. (26) 1939 ALL. 415 : (I. L. R. (1939) ALL, 607 (FB), which is a F. B. decision, the question was whether when a share is sold in execution of a mtge. decree, the residential house passes with it. Each of the learned Judges composing the F. B. exhaustively consd. the matter & four of them came to the conclusin that the house did not pass, Allsop J. aloee taking a different view. Iqbal Ahmad J. said :

> 'The ownership of the residential house is, therefore referable not to his zamindari interest in the mahal but to the intention of having a home for himself and his family. It follows that the residential house of a zamindar is a separate unit & in no sense a part & parcel of the proprietary right owned by him in the mahal."

27. I am aware that the view taken in some Avadh cases is different but that view is by no means consistent &, in any case, it cannot prevail over the F. B. decision.

28. The right of ownership is thus a right separate & distinct from the right to occupy. At least in the case of lands which are let out to tenants at the date of mtge, it is only the proprietary right that can be said to be mortgaged & it is only the rent received from the tenants that can be consd. in ascertaining the net profits.

29. Similarly in the" case of culturable waste, the mtgee. will not be liable to account for such amount as might have been obtained by bringing the land under the plough on the ground that this is the profit "which with the exercise of ordinary diligence might have been realised."

30. If the mtgor. actually takes into his own cultivation land which was formerly cultivated by tenants or which he reclaims from waste, that was not a part of his duty as a mtgor. & he is not accountable as mtgor. for the profits which he makes by this process. These acts of the mtgor. would be acts of "improvement" of which he will bear" the gain or loss. In view of the definition of "mesne profits" in Section 2(12), C. P. C., even a trespasser is not liable to account for such profits as he earns by making improvements on his own responsibility. There is nothing in Section 9, Debt Redemption Act, which can be construed as placing the mtgee. in a worse position than a trespasser

31. Is the position any different if the land was held by the mtgor. as his sir or khudkasht ? In such lands, as in the land occupied by his house, the proprietor possesses both interests, the right of ownership as well as the right to cultivate. It is, however, only the former interest that can be mortgaged. Section 9 (2), U. P. Tenancy Act provides:

> "Sir right is not transferable except (a) by gift to a person to whom the proprietary right in the sir is gifted, or (b) by exchange."
>
> * * *
>
> 32. Section 26 (l). Tenancy Act, reads as follows :
>
> "(1) When the landlord of the whole of a mahal or of a specific area in a mahal transfers the whole of his proprietary right in such mahal or area by voluntary alienation otherwise than under the provisions of Sub-section (2) of Section 9, or when the whole of such landlord's right in such mahal or area is transferred by foreclosure or sale in execution of a decree or order of a civil or revenue ct. the landlord shall become an exproprietary tenant of his sir & of such portion of his khudkasht as ha has cultivated continuously for three years at the date of transfer."

33. Thus the cultivator's right in the sir or khudkasht of a landlord is not transferable &, even on a transfer of the proprietary right taking place, the landlord is entitled to retain possession of the cultivatory right. Farther if the transferor does not retain possession but allows the transferee to take possession, the transferee's possession is not that of a sir-holder or a khudkasht holder.

34. As pointed out by my Lord, the Chief Justice, in Surju Prasad v. Randhir Singh, 1945 O. A. H. C. B. 55 :

> "It must be remembered that a tenant not only provides seeds and manure but gives a lot of his time & labour in ploughing and watering the field & in sowing the crops, & he also takes the risk of the possible failure of crops."

35. Again, as stated by my learned brothers Ghulam Hasan and Misra JJ. in Baiju v. Ajodhia Dass, 1947 O. W. N. C. C. 532 :

> "If, for example, a mtgee. of a building brews and sells beer in it, it is inconceivable that he should be called upon to account for the profits of his sale or again if a mtgee. of a tank catches & sells fish, it is hardly possible to charge him with the profits which might accrue to him as a result of his enterprise. The reason is obvious. the actual brewing & sale of beer or the netting & sale of fish is not a part of the mtgte's. duty as such."

36. Further, if a mtgee. were to start a brickkiln or a lime factory or a diary or poultry farm on mortgagee land or if he were to start the business of a lodging house keeper in a mortgaged house & let out portions of it to lodgers, performing the necessary services, he could not be called upon to account for the profits of any business that he may start. Agriculture is as much a business as any other. There is thus no reason why he should account for the profits of the business of agriculture to mtgor. If the business results, in any year, in a loss he would not be able to charge interest at 4 1/2 percent for that year; why then should he be made to hand over the profits by accounting for them ?

37. The profit of the proprietary right is only the fair occupation rent, i e. that rent at which the land may be lawfully let out The profit calculated at the value of the produce less the costs of cultivation is not the profit of the right mortgaged, i.e. the proprietary right. It is the profit of the cultivator's right or of the business of agriculture carried on by a person on land which has been mortgaged. It cannot be consd. in determining "net profits."

38. In Sant Ram v. Ram Bilas, A. I. R. (31) 1944 ALL 283 : (I.L.R. (1944) ALL. 616), the District Judge had held that "net profits" meant usufruct minus costs of production. In appeal it was contended that Section 233 (2), U. P. Tenancy Act, should be applied in determining profits.. This plea was repelled, & I agree, though for a different reason, that that Sub-section is not applicable. The learned Judges then repelled the contention advanced on behalf of the mtgee. that it would be taxing the mtgee. for his skill & labour to make him accountable for the usufruct on the ground that it was the mtgee's. duty to manage the property as a man of ordinary prudence would do so & "to use his beat endeavours to collect the rents & profits thereof" with all respect to the learned Judges it must be pointed out that they have failed to notice that it is not the cultivator's right that has been mortgaged & that it was consequently not the mtgee's duty to cultivate the property. Further, as pointed out in Surju Prasad, v. Randhir Singh, 1945 O. A. H. C. B 55 it is not only his own labour & skill that are involved but a further investment by the mortgagee in providing seed & manure & if need be, hired labour, & he takes the risk. It is not a part of his duty as a mtgee. to make further investments, of which he takes the risk, in order to provide an additional profit without risk of loss for the mtgor.

39. In Deo Rai v. Arti Rai, A. I. R (32) 1945 ALL. 174: (I. L. R. (1945) ALL 6l) the Ct. below had found that Rs 15 per bigha was the fair rate of profits which the mtgee. must be taken to have made. This was treated as a finding of fact & was not challenged in appeal. The learned Judges, therefore, do not give their own decision on the question of the principles to be adopted in deter, mining profits but,

in the absence of any challenge in the appeal, accept the finding arrived at by the lower Ct. & make calculation on that basis.

40. The case of Khashi Prasad v. Raghunandan, A. I. R. (35) 1948 ALL. 344: (I. L. R. (1948) ALL 310) was decided by a Bench composed of my Lord the Chief Justice & my learned brother Bindbasni Prasad J. The opinion expressed by the two learned Judges was not the same, though their conclusion with regard to the fate of the appeal was the same. In that case the Civil Judge had calculated the profits of the land under the cultivation of the mtgee. himself at an estimated value of the produce minus the costs of cultivation. The evidence as to this was oral & was widely divergent. As a result the Civil Judge fixed the annual profits on a consideration of the quality of the land & on his own experience.

41. Bindbasni Prasad, J. held that the provisions of Section 9, U. P. Debt Redemption Act are in conflict with the provision in Section 76(h), T. P. Act as to fair occupation rent & the latter must, therefore, be rejected in determining mesne profits. He further distd. English authorities in which it was laid down that the mtgee. is only liable for a fair occupation rent on the ground that the clear statutory provisions of Section 9, U. P. Debt Redemption Act are against this view. The learned Judge then proceeded to consider the provisions of Sections 110 & 111, U. P. Tenancy Act, relating to a determination of rent, but joined that there was no evidence as to circle rates & consequently no decision could be based on these rates.

42. With all respect it may be pointed out that the learned Judge has failed to notice the fact that the principal question for determination is what the expression "net profits" means: does it mean the fair occupation rent or something else? If it is capable of being interpreted as fair occupation rent there is no inconsistency between the expression "net profits" & "fair occupation rent." When there are two parallel statutes in existence, it would not be in accordance with the correct principles of interpretation to give to expressions used in one of them, which are capable of having more than one meaning placed upon them, that meaning which has the effect of abrogating a clear provision of the other statute. In such a case every endeavour will be made to reconcile the two statutes & in the present case, it would not be straining the language used if the words "net profits" are interpreted as meaning "fair occupation rent" in respect of that property which is in the actual occupation of the mtgee. Such an interpretation would be in accordance with the well understood principles which govern accounting between the mtgor. & mtgee. both in the Indian as well as the English Law & there is no reason to reject it.

43. In the same case my Lord the Chief Justice inclined to the view that "net profits" mean "fair occupation rent" in respect of the property in the actual occupation of the mtgee. but he felt himself bound by the decision in Sant Ram v. Ram Bilas, A. I. R. (31) 1944 ALL 283: (I. L. R. (1944 ALL 616), and he added "Moreover the point raised by Mr. C. S. Saran was not raised in the Ct. below, with the result that we have no materials from which to find what would be the fair occupation rent."

44. Thus it cannot be said of the decision in Kashi Prasad v. Raghunandan, A. I. R. (35) 1948 ALL 344: (I. L R. (1948) ALL 310) that it entirely supports the contention of the appcts. in the present

case. Indeed, in so far as the opinion of one of the learned Judges comprising the Bench is concerned, it was against that view.

45. There are two other decisions, both unreported which support the applt's contention. They are Civil Revn. No. 197 D. 5-1-1949, by my learned brothers Raghubar Dayal & Agarwala, JJ. & Section 115 Appln. no. 100 of 1946 D- 10-2-1950, by my learned brother Ghulam Hasan J. In neither of these cases, however, is there any discussion. In the latter case the decision in Kashi Prasad v. Raghunandan, A. I. R. (35) 1948 ALL 344: (I. L. R. (1948) ALL. 310) was simply fold. & in the former case the learned Judges satisfied themselves by saying:

> "In the case of usufructuary mtge. the "Of. is directed by Section 9 of the Debt Redemption Act to determine the net profits, realised by the mtgee' or 'which with the exercise of ordinary diligence might have been realised by him. This does not necessarily refer to the rental value of the land Where the land is in the actual cultivation or possession of the mtgee, the profits realised by him would be calculated by the value of the produce minus the cost of production."

46. The decision of Wanchoo and P. L Bhargava, JJ. in Nand Kumar v. Kuber Lal, I. L. R. (1950) ALL 228: (A. I. R. (37) 1950 ALL 192) is also of assistance to the appct. in so far as the principle is concerned, but it is against him on the actual facts, in that case it was held that, if it is possible to determine by evidence the amount of actual income (after deduating costs of production) derived by the mtgee. from the mortgaged property, that income will be deemed to be net profits but if this is not possible the Ct. would not be justified in adopting some such a "fanciful" rule as multiplying the circle rate of rent by five & deducting forty per cent, there from as costs of production. In the absence of requisite evidence the Ct. should only assess profits at the rate of rent payable by Sub-tenants.

47. A reference to Sub-tenants clearly indicates that the learned Judges consd. the mtgees. to be in the position of sir-holders in respect of land which was in their cultivation, while this was not in fact so.

48. Moreover, on this basis the decision of the lower appellate Ct. would be the proper decision.

49. These are all the authorities which the learned advocate for the appct. could rely upon in support of his contention. The authorities on the other side are equally numerous & were very fairly placed before us by applt's learned advocate.

50. To the earliest of these cases reported in Surju Prasad v. Randhir Singh, 1945 0. A. H. C. B. 55, I have already refd. That case fold. the still earlier decision in S. A. No. 2282 of 1943 decided on 1-3-1945.

51. The next Case is the decision by my learned brother Raghubar Dayal J., in Pran Dei v. Ganga Prasad, 1947 A. L. J. 230 : (A. I. R. (35) 1948 ALL. 54). He refd. to the decision in Sant Ram v. Ram Bilas, A.I.R. (31) 1944 ALL. 283 : (I. L. R. (1944) ALL, 616) & S. A. No 2282 of 1943 & he held that

the profits of the land in the actual possession of the mtgee. should be calculated at its letting value calculated at the sanctioned circle rates, & he disapproved of the calculation made by the lower Ct. at five times the circle rates, deducting there from 25 percent, for costs of cultivation. There is no discussion of the question in this case.

52. In Babu Ram v. Hardwari Lal, 1947 O. W. N. 134 : (A.I.R. (34) 1947 Oudh 143) my learned brother Misra J. also held that the calculation of profits should be at circle rates. In this case also there is no discussion of the matter.

53. In the next case, however, Baiju v. Ajodhia Dass, 1947 O. W. N. 532, my learned brothers Ghulam Hasan & Misra JJ. have discussed the matter at considerable length & after referring to English decisions & various provisions of the Indian enactments they came to the conclusion that, in the case of property in the actual possession of the mtgee." the expression "net profits" contained in Section 9, U. P. Debt Redemption Act, & "fair occupation rent" in Section 76(h), T. P. Act, have Substantially the same significance."

54. I respectfully agree with the reasoning of this decision & with the conclusions at which the learned Judges arrived. This decision does not seem to have been brought to the notice of my learned brother, Bind Basni Prasad J. during the course of arguments in Kashi Prasad v. Raghunandan, A.I.R. (35) 1948 ALL. 344 : (I. L. R. (1948) ALL. 310).

55. In Kalpu Ahir v. Mukat Nath, 1948 O. W. N. 419 : (A. I. R. (36) 1949 ALL. 320) my learned brother Bhargava J. simply followed the decision in Pran Dei's case, (1947 A. L. J. 230 : A. I. R. (35) 1948 ALL. 54). He also quoted & agreed with the view expressed by my Lord the Chief Justice in Surju Prasad v. Randhir Singh,l945 O. A. H. C. B. 55.

56. In Gajadhar v. Ram Bux, I. L. R. (1950) ALL. 86 another Bench of this Ct. consisting of Kaul & Chandiramani JJ. followed the decision in Baiju v. Ajodhia, 1947 O. W. N. 532.

57. These are all the cases on either side which were placed before us. Having regard to what I have said in the earlier part of this judgment with regard to the nature of the property mortgaged & the nature of the acts of the mtgee. in cultivating a part of the mortgaged land, I have repeatfully come to the conclusion that the view enunciated in Baiju's case, 1947 O. W. N. 532 is right & should be accepted. It was thus the duty of the trial Ct. to ascertain not the produce of the land in the possession of the mtgee. but the fair occupation sent of that land.

58. Under the U. P. Tenancy Act the landlord and tenant are empowered to fix the rent by agreement but in case they cannot agree & the Ct. is called upon to fix the rent it can only do so at the rent payable in respect of the land for the year previous to that in which it is let or at the sanctioned circle rates--vide Section 94, U. P. Tenancy Act. Further it is open to the Ct. fixing rents, if special reasons exist, to modify the circle rates--vide Section 101 If rent-rates have not been determined for any locality the Ct. is authorised to fix rents "after making a local inspection & considering the rent generally payable by tenants of the same class for land of the same class in the vicinity"--Section 103.

59. The rents payable by Sub-tenants are higher but they are applicable only to Sub-tenants & they do not represent "fair occupation rent" : they are deliberately put high so that the tenant may be able to get something over & above what he has to pay to the landlord. This is clear from Section 110 (l), Tenancy Act & Section 63, U. P. Land Revenue Act, which provide that "the rates proposed by the rent rate officer for hereditary tenants shall be 'such as will result in rents payable without hardship over a series of years by cultivating hereditary tenants with Substantial holdings & shall be based on genuine & stable rents paid by such tenants."

It is obvious that it is only rent so determined, with such modifications as the Court might deem fit to make, having regard to the peculiarities of the land that can be called "fair occupation rent" & not rent payable by Sub-tenants.

60. Thus it is possible for the parties to produce evidence to show what is the rent payable by other tenants in the vicinity for the same class of land, since this would indicate the rent at which a tenant to whom land is being let out for the first time would agree, or to give any other evidence of the nature contemplated by the provisions of the Tenancy Act to show what the fair occupation rent will be. In absence of any such evidence it must be taken that a calculation based on the sanctioned rent rates gives a fair occupation rent.

61. In the present case there is no evidence from which the Court may ascertain what the fair occupation rent is other than the evidence as to sanctioned circle rates.

62. The method adopted by the Civil Judge must, therefore, be accepted. I would accordingly dismiss these applns. with costs.

Misra J.

63. The reference of these two revns. to the F. B. was necessitated by a conflict between Baiju v. Ajodhia Das, 1947 O. W. N. 532 V & a number of cases decided at Allahabad both prior to the amalgamation of the two Cts, & Subsequently about the meaning to be attached to the expression 'net profits' occurring in Section 9, U. P. Debt Redemption Act. The Allahabad Cases mentioned in the referring order are: Sant Ram v. Ram Bilas, I. L. R. (1944) ALL. 616 : (A. I. R. (31) 1944 ALL. 283); Kashi Prasad v. Raghunandan, A. I. R. (35) 1948 ALL 844 : (1948 A. L. J. 449) and Chandrabhan v. Ganpat, Appln. No. 197 of 1915. The views taken in them are not uniform.

64. Dara who is the appct. in both these revns, moved the Revenue Officer, Hardoi, for redemption Under section 12, Agriculturists Relief Act of two possessory mtges & a deed of further charge executed by his father, Parmanand, in favour of Jaggoo. The first of the two mtge. deeds was executed on 25-2-1915, in lieu of Rs. 600. It covered two under-proprietary plots, Nos. 6 & 1799 measuring 1 bigha 17 his was in village Balamau, District Hardoi. The aforesaid plots were again given as security in 1928 for repayment of Rs. 100 borrowed by Parmanand under a deed of further charge. The second mtge. "related to under, proprietary plots Nos. 1473 & 1578 measuring 1 bigha 8 his was in the same village. This deed was in lieu of Rs. 400. Out of the consideration, a sum of Rs. 235 was set off against two previous mtge. deeds of 1904 & 1920 & a sum of Rs 165 was received by

Parmanand in cash. The hypothecated plots instead of being let out to tenants in the usual way were cultivated by Jaggoo personally. Dara who was also entitled to the benefits of the U. P. Debt Redemption Act claimed that he was entitled to be credited Under section 9 of the enactment with the profits derived by Jaggoo from the eultition of the land & that so calculating the mtgee. 's profits, the mtges. & the deed of further charge were satisfied from the usufruct. According to the case put up by the mtgee. on the other hand the sums lent still remained due since the rents & profits which alone could be taken into account were not enough to satisfy the interest even if calculations were made at the rate sanctioned by the Debt Redemption Act (xIII [13] of 1940).

65. Dara's redemption applns. were consolidated & decided together. The trial Ct. computed the net profits of the mtgee. at three times the circle rate minus the under-proprietary rent & came to the conclusion that Rs. 74 were still due to the mtgee. in respect of the deed of 1915 & the deed of further charge & Rs. 220 were payable to the mtgee. on the deed of 1924. It, therefore, ordered redemption on payment of these sums. Jaggoo went up in appeal to the Ct. of the Civil Judge, Hardoi & succeeded in his contention that he should be debited only with the rent of the plots at circle rates minus the under, proprietary rent paid by him to the superior proprietor. The accounts made by the learned Judge showed that Rs. 364 were due on the first mtge. & the connected deed of further charge & Bs. 398 on the mtge. of 1924.

66. Jaggoo died during the pendency of the revn. applns. & is now represented by his son, Mathura, who was Substituted by this Ct. in place of his deceased father.

67. The two revn. applns. came up for hearing before Desai J. He agreed with the view of the lower appellate Ct. but made the reference on account of the conflict refd. to above.

68. A mtgee. when he enters into possession of a mortgaged estate has certain duties to perform in relation to the property, These duties may be summed up by saying that he must manage the mortgaged property as if it was his own. The care which he must use for this purpose is similar to that which the law requires of a trustee. During the period of his possession, he is accountable to the mtgor. for the income of the property but is not usually required to account for more than the actual value of the land or for what he has received by way of rents & profits unless it can be proved that but for his wilful default or mismanagement or fraud he might have received more. The relations between him '& his debtor remain throughout the Subsistence of the bond those of a mtgee. & a mtgor.

69. There are three kinds of rights in the landed property in this part of the country (l) The paramount right of the State (2) The right of a superior proprietor who may oirve out from his estate the Subordinate right of an under proprietor, & (3) The rights of tenants or the actual cultivator of the soil.

70. A possessory mtge. of a superior or under-proprietary right in land contemplates a temporary transfer of the right of the proprietor to collect the rents from the tenants & to take the profits otherwise arising from the land to the landlord such as profits from groves, orchards, ferries, fisheries & the sewai income etc. The profits of a tenant are the fruits of his cultivation arising: from

his investment, skill & toll. A mtgee. of proprietary or under-proprietary land who enters into actual occupation & raises crops which he sells for profit fills two capacities: As mtgee. he is a transferee of the owner's rights & as an acutal occupier of the land he is virtually a tenant. For the profits derived by him as a mtgee., he is accountable to the owner, in other words, he must credit his debtor with the rents which he collects or ought to have collected but for his wilful default. The gains of cultivation do not arise from the exercise by him of any rights as a mtgee. & the mtgor., therefore, cannot lay any claim to them. This being the fundamental difference between the two kinds of profits, it would seem wholly inappropriate to the relationship of mtgor. & mtgee. to include within the latter's profits the benefits which like any other tenant he derives from the cultivation of the land. The contention urged for the appct. is in fact in total disregard of the basic conception of the relationship of the parties who enter into possession under a transaction of mtge.

71. In English law a usufructuary mtgee. in occupation of the property has always been chargeable with what the land would have fetched in the shape of rent if it was let out in the ordinary way, & if he effects any improvements which bring him higher' profits, he is allowed to retain the benefits thereof : see Halsbury' Laws of England, 2nd Ed. Vol. 23, Para. 550. In the well known case of Lord Trimleston v. Hamill, (1810) 12 R. R, 38 : (l Ball & B. 385) decided as far back as 1810, Lord Chancellor Manners of Ireland laid down the law which has been accepted in England ever since as establishing the rule of fair occupation rent. The cases of Metcalf v Camton & Fee v. Cobine cited in Halsbury's Laws of England, vol. 23, Para, 550 are in point. I would like to refer also to Marriott v. Anchor Reversionary Co,, (1861) 45 E. B. 846 : (3 De G. p. & J. 177) and White v. City of London Brewery Co., (1888) 39 Ch. D. 559 : (58 L. J. ch. 855) which was affirmed by the Court of Appeal in (1889) 42 Ch. D. 237 : (58 L. J. Ch. 855). In the former cast), the mtgee. of a ship employed the craft carelessly in a hazardous & speculative business & eventually sold her for a small sum because it had greatly depreciated in value on account of its misuse. Lord Justice Turner in considering the liability of the mtgee. to account held that the proper form of decree would be to charge the mtgee. with what the ship might have earned if chartered in the ordinary course & further with such damages beyond ordinary wear & tear as was occasioned by its reckless & hazardous employment In doing so, he observed:

> "A mtgee. of houses or lands occupying the houses or farming the lands is chargeable with occupation rent & upon the same principle I think the defts. ought to be charged with what the vessel might have earned if chartered in the ordinary course. I think too that the defts. ought to be charged with any damage beyond ordinary wear & tear which may have arisen in the course of their employment of the vessel: but with all respecst to the vice-Chancellor & all deference to the Lord Chancellor & my learned brother, I think the decree should have gone no further except of course in the usual direction as to wilful default."

In the other case White v. City of London Brewery Co., (1889) 42 Ch. D. 237 : (58 L. J. ch. 855), the same principle is brought out but perhaps in somewhat bolder relief. The mtgees. in possession there were brewers & the property was a public house. They let the premises to a tenant with the restriction that the latter must take beer of their brewing alone & of none other. The mtgor. sought to charge the mtgees. with a sum of 1991/18/9 representing the profits of the mtgees. arising from

the sale of the beer to the tenants. North J. in delivering the judgment observed that the mortgaged hereditaments had nothing to do with the supply of beer & since the inquiry had to be confined to the rents & profits of the hereditarnents, the sum received by the mtgees. by way profits on the sale of beer was not something for which the mtgees. were accountable to the mtgor. They were charged, therefore, only with the actual rent & the depreciation which that rent suffered on account of the restriction imposed by the mtgees. on the rights of the lessee to purchase their beer freely in the market. In the Ct. of Appeal, Lord Esher M. R. felt somewhat outraged by the applt's contention & observed as follows :

> "But the nominal pltf. says: 'No, you must account to me for the profits which you have made upon beer which you have supplied to the house, as being part of the rents & profits which you have got out of the mortgaged property." Can those profits .on beer supplied to the house be said to be profits by & out of the premises ? Such an idea seems to me simply preposterous & we cannot entertain it. Has anybody ever thought that such profits were to be brought into account."

Lord Justice Cotton & Lord Justice Fry took the same view.

72. Before the codification of the law of transfer in India, the rule adopted in the Indian H. Ct. was identical. See Bhageerath v. Mulik, (1853) S. D. N, W. P. 107 ; Boonaid v. Din Dayal, (1854) S. D. N. W. P. 201 ; Mt. Sidhnee v, Lulloo Singh, (1862) s. D. N. W. P. 62; Debee Per shad v. Pur sun Rai, (1862) S. D. N. W. P. 108 ; Sumbul Singh v. Dulthummun Tewaree, (1864) S. D. N. W. P. 117 ; Chowharja Dayal v. Mahomed Ali, (1864) S. D. N. W. P. 518 & Rughoonath Roy v. Baraik Geereedharee Singh, 7 W. R. 244. Since the codification of the law of transfer, Clauses (b) & (h) of Section 76, T. P. Act provide that in the absence of a contract to the contrary a mtgee. in possession must use his best endeavours to collect the rents & profits & where the property is personally occupied by him, he should be debited with a fair occupation rent, in respect of it in reduction of the amount due to him from the mtgor. after deducting there from the usual expenses of collection etc. What is 'fair occupation rent' is a question of fact in each case. It represents normally the rent at which the property could have been let out to tenants. The expression 'net profits' in Section 9(l) has much the same meaning. The section reads :

> "In a suit to which this Act applies or in amending a decree under the provisions of Section 8, the Ct. shall, notwithstanding anything to the contrary in any law, decree or contract or in any agreement purporting to close past transactions, determine the principal & take into account all sums paid by or on behalf of the debtor & in the case of mtge. with possession, the net profits realized by the mtgee. or which with the exercise of ordinary diligence might have been realised by him, &, shall determine the amount, if any, due by the debtor in accordance with the provisions of the following Sub-sections."

The provision relates to the actual & possible realizations of a mtgee. & the expression, 'net profits' would seem to imply that the creditor is entitled to deduct his expenses etc. in the like manner as he is entitled to do Under section 76(h), T. P. Act. Ordinary diligence required of a mtgee. Under

section 9, Debt Redemption Act, does not impose on him a larger duty than what he is called upon to perform Under section 76, T. P. Act & since a mtgee. need only act as a prudent owner would act, it cannot be regard, ed as a part of his obligation to raise crops on the land & to credit the mtgor. with the gains of his cultivation. The unreasonableness of the contention urged on behalf of the applt. may be brought out more clearly by taking the case of a possessor mtgee. of a building who uses the premises as hotel or a shop or a publishing house. :If the argument which insists on charging the mtgee. with all profits of whatever nature arising from the mtged. property was sound, the entire profits of the hotel keeping or the shop or the publishing house would have to be debited against the mtgee. To my mind such a result is wholly outside the language of Section 9(1).

73. My learned brother Kidwai J. has discussed the matter from the view point of the Land Revenue Act & the tenancy law & if I may say so, I agree with him completely.

74. I was a party to the decision in Baiju v. Ajodhia, 1947 O. W. N. 532, and I still adhere to the view which I expressed there in spite of a reconsideration of the whole matter in the light of the opinion of my learned brother Binod Basni Prasad J. in Kashi Prasad v. Raghunandan, A.I.R. (35) 1948 ALL. 344: (I. L. R. (1948) ALL. 310). I am with respect in full accord with the view expressed by my Lord the Chief Justice in his separate judgment in that case. The case of Sant Ram v. Ram Bilas, I. L. R. (1944) ALL. 616 : (A. I. R. (31) 1944 ALL. 283), & the other decisions cited at the Bar have been examined by my learned brother Kidwai J. & I have nothing to add to what he has said in the course of his judgment.

75. In the absence of any other evidence regarding fair occupation rent of the plots the learned Civil Judge was in my judgment justified in deciding the cases on the basis of sanctioned circle rates.

76. I would dismiss these applns. with costs.