

**(1910) 08 CAL CK 0001**

**Calcutta High Court**

**Case No:** Appeal From Order No. 244 of 1909

Benode Lal Bandopadhyaya and  
others

APPELLANT

Vs

Harish Chandra Tewari, Principal  
and Others

RESPONDENT

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**Date of Decision:** Aug. 24, 1910

**Final Decision:** Allowed

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### **Judgement**

1. This appeal is directed against an order for distribution of sale-proceeds between the first mortgagee and the second mortgagee, who were made parties to a suit by the third mortgagee to enforce his security. It appears that the mortgagor, Harish Chandra Tewari, executed a mortgage on the 15th December 1894 in favour of one Kali Krishna Choudhury now represented by the executors to his estate who were made the second, third and fourth Defendants in the mortgage suit. The mortgagor executed a second mortgage in favour of the fifth Defendant on the 12th June 1896 and a third mortgage in favour of the Plaintiff on the 11th July 1899. He appears to have executed other mortgages subsequently in favour of the sixth and seventh Defendants.

2. The Plaintiff, third mortgagee, sued to enforce his security and joined as party Defendants not only the mortgagor but also the two prior and the two puisne encumbrancers. On the 16th March 1906 the prior mortgagees consented to an order for sale of the mortgaged properties free of all encumbrances. The Court thereupon passed the following order:

That the suit be decreed with costs bearing interest at 6 per cent, per annum, that the Defendant do get three months' grace to pay off to the Plaintiffs or to the Court the principal and interest due on the mortgage with costs as above ordered, that on default the mortgaged property No. 1 (in which the third mortgagee alone was interested) be sold first, that in the case of balance remaining due, the mortgaged property No. 2 be sold free from encumbrances and the sale-proceeds be applied,

first to the mortgage amount due to the Defendant No. 2 or 4, then to the Defendant No. 5, and then to the balance due to the Plaintiff, and lastly to the Defendants Nos. 6 and 7. The Decree as originally drawn up was not in accordance with this judgment; but it was subsequently amended and brought into conformity with it. The period of grace expired and neither the mortgagor nor the puisne mortgagees paid anything. Execution was therefore taken out by the decree-holder third mortgagee, and the property common to the various mortgages was sold on the 22nd September 1908. One fourth of the purchase-money was deposited by the purchaser on that date and the balance was paid into Court on the 30th September 1908. On the 30th October 1908, the judgment-debtor made an application to set aside the sale.

The result was that the time of the Court was occupied up to the 23rd January 1909, with the consideration of the question of the validity of the sale. On that date the application for reversal of the sale was rejected, and the sale was confirmed. Shortly after, on the 5th March 1909, the Court proceeded to determine how the sale-proceeds, which were insufficient to satisfy in full the claims of both the first and second mortgagees, were to be applied. The controversy between them related to the point of time up to which interest as stipulated in their respective mortgages was to run according to the contract rates. The Subordinate Judge held that the interest was to be calculated upon each of these securities up to the date of the sale, and he distributed the proceeds on this basis. The first mortgagee has now appealed to this Court, and on his behalf it has been contended that the order of the Court below is erroneous inasmuch as interest ought to have been allowed on his security up to the date of the confirmation of the sale.

3. A preliminary objection has been taken to the competency of the appeal on the ground that the order is not a decree within the meaning of sec. 2 of the CPC of 1908 and is consequently not appealable. In our opinion, there is no force in this contention. The order is clearly one within the scope of sec. 47, sub-sec. 1 of the CPC of 1908. The question raised is one which arises between the parties to the suit, in which the decree was passed. It also relates to the satisfaction of the decree because the decree directs the sale-proceeds to be applied in the first instance to discharge the debt due to the first mortgagee, then to the second mortgagee and the balance to be applied to the satisfaction of the debt due to the Plaintiff, the third mortgagee. Consequently the question is clearly one between the parties to the suit and relates to the satisfaction of the decree. The order is, therefore, a decree within the meaning of sec. 2 of the Code, and is appealable as such.

4. The question we are invited to determine, relates to the date up to which interest at the contract rate can be claimed by the first and second mortgagees. Is it the date of sale as held by the Subordinate Judge, or the date of the confirmation of sale as contended by the first mortgagee, or the date of the payment of the purchase-money into the Court as argued by the second mortgagee, or the date

fixed in the decree for the repayment of the mortgage-money due to the Plaintiff third mortgagee as suggested by the mortgagor. Of these four possible alternatives, obviously the date accepted by the Subordinate Judge cannot be supported. On the date of the sale, the whole of the purchase-money which was to be distributed between the different mortgagees was not available for the purpose. Consequently the date of sale cannot be regarded as the date up to which interest should run upon the prior security. The real point in controversy between the parties is, whether the date should be that on which the whole purchase-money was brought into the Court by the purchaser or the date of the confirmation of sale. In our opinion, it is the latter date which ought to be accepted as the time up to which interest must run upon each of the senior securities. It has been argued on behalf of the second mortgagee that the sale-proceeds became available for distribution amongst the mortgagees as soon as the purchase-money was paid into Court by the purchaser, and in support of this view reliance has been placed upon the cases of *Jogendra Nath Sirkar v. Gobind Chunder Addi* ILR 12 Cal 252 (1885) and *Hafiz Mahomed Ali Khan v. Damodar Pramanik* ILR 18 Cal. 242 (1891). Neither of these decisions, however, is of any real assistance to the second mortgagee. The case of *Jogendra Nath Sirkar v. Gobind Chunder Addi* ILR 12 Cal 252 (1885) shows that although it may be open to the Court to distribute the sale-proceeds amongst the different claimants before the sale has been confirmed, it is by no means obligatory upon the Court to do so. In our opinion, an order for distribution ought not ordinarily to be made before the confirmation of the sale. At any rate, the first mortgagee cannot be called upon to demand distribution of the sale-proceeds before the sale has been confirmed. The case of *Hafiz Mahomed Ali Khan v. Damodar Pramanik* ILR 18 Cal. 242 (1891) also does not support the contention of the second mortgagee. That case merely shows that the deposit is not available for distribution in any event before the whole of the money has been brought into Court; it does not affirm the doctrine that the deposit is available as a matter of course for distribution before the order for confirmation has been made. The true principle which ought to guide the Court in this matter is, we think, to be found in sec. 84 of the Transfer of Property Act. Under that section when the mortgagor or other person entitled to redeem has tendered or deposited in Court under sec. 83 the amount remaining due on the mortgage, interest on the principal money ceases from the date of the tender or as soon as the mortgagor or such other person as aforesaid has done all that has to be done by him to enable the mortgagee to take such amount out of Court as the case may be. In other words interest upon mortgage debt does not cease to run till the mortgagor has rendered it possible for the mortgagee to take the money out of Court. The effect of the sale in the case before us was no doubt to make the money available for distribution amongst the different mortgagees in the event of the ultimate confirmation of the sale. But the mortgagor, shortly after the sale, applied for reversal of the sale on the ground of irregularity and fraud. By his own conduct, he challenged the validity of the sale and thus made it practically impossible for the prior encumbrancers to ask for a

distribution of the sale-proceeds, till those proceedings had terminated. In substance, if the sum realised by the sale be treated as the property of the judgment-debtor which he tendered to the prior encumbrancers in satisfaction of their dues, the tender was entirely of a conditional character. The prior encumbrancers could not be expected, in these circumstances, to take the money, and run the risk of being called upon to refund the sum to the purchaser as soon as the sale was reversed at the instance of the mortgagor. In our opinion, the Court below ought to have directed the distribution of the sale-proceeds on the assumption that each of the prior encumbrancers was entitled to interest at the contract rate up to the date of the confirmation of the sale, which was the earliest date on which money became really available for distribution amongst the different mortgagees.

5. We have not yet referred to the suggestion of the mortgagor that interest at the contract rate upon the senior securities should cease on the date fixed in the decree for repayment by the mortgagor of the sum due to the Plaintiff, third mortgagee, because this contention is, in our opinion, clearly unfounded. Reference was made by the learned Vakil for the mortgagor to the form of the decree given in Appendix D., Form No. 8 of the CPC of 1908. That decree is essentially different from the decree drawn up in this case. The leading feature of that decree is that one period of redemption is fixed for the Plaintiff mortgagee as well as the prior encumbrancers joined as parties to the suit. In the case before us, the decree fixed the period of redemption for the Plaintiff, third mortgagee, alone. It did not determine the amount due to the prior encumbrancers; nor did it define the period within which the mortgagor must satisfy their claims. Consequently the decree could not be deemed to transform the contractual obligations in favour of the prior encumbrancers into judgment-debts. The result was that when the sale-proceeds realised at the execution sale become available, the prior encumbrancers could take the amount due to each of them on the footing of their respective mortgages which were in no way affected by the decree made in favour of the Plaintiff mortgagee. The result is that this appeal is allowed and the order of Court below varied. An account must be taken by the Subordinate Judge on the footing of the directions given in this judgment. Any amount which has been paid in excess of what was legitimately available to the second mortgagee must be refunded by him to the first mortgagee. The first mortgagee is entitled to the costs of this appeal from the second mortgagee. We assess the hearing fee at two gold mohurs.