

## Achalabala Boss. Vs Surendra Nath Dey.

**Court:** Calcutta High Court

**Date of Decision:** July 13, 1897

**Acts Referred:** Transfer of Property Act, 1882 " Section 86, 88, 90, 94, 97

**Citation:** (1897) ILR (Cal) 766

**Hon'ble Judges:** Jenkins, J

**Bench:** Single Bench

### Judgement

Jenkins, J.

This is an ordinary mortgagee's suit in which the plaintiff seeks to enforce her security, and the only question involved is

whether the decree should provide for the payment of subsequent interest. The doubt is due to a decision of the Allahabad Court in the case of

Amolak Ram v. Lachmi Narain ILR 19 All. 174 the head note of which is as follows:

In a suit upon a mortgage for the sale of the property mortgaged the Court has no power to allow in the account u/s 80 of the Transfer of Property

Act, 1882, or in its declaration under that section, interest for a period beyond the date of payment which is to be fixed within six months from the

date of the decree.

Sections 209 and 222 of the Code of Civil Procedure, 1882, do not affect the special provisions as to allowance of interest contained in the

Transfer of Property Act, 1882.

In construing a decree, the terms of which are ambiguous, such construction must, if possible, be adopted as will make the decree in accordance

with law, and not a decree such as the Court making it had no power to pass.

2. The portion of the judgment which deals with this actual point, is in these terms:

Now, it is contended on behalf of the decree-holders that the decree gave them interest on the principal amount beyond the date of the expiration

of the six months which the Court fixed as the time when the payment should be made. We must see what would have been a legal decree in this

case. A decree for sale can only be made under the Transfer of Property Act, 1882. It is as well to bear that in mind. The decree which can be

made in a case like this is that which is specified in Section 88 of the Act. A decree for sale, according to Section 88, shall be to the effect

mentioned in the first and second paragraphs of Section 86 of that Act---"and also ordering that, in default of the defendant paying as therein

mentioned, the mortgaged property or a sufficient part thereof, be sold, and that the proceeds of the sale (after defraying thereout the expenses of

the sale) be paid into Court and applied in payment of what is so found due to the plaintiff, and that the balance, if any, be paid to the defendant or

other persons entitled to receive the same." In order to see what would be a decree to the effect mentioned in Section 86, we must look at Section

86. We find that by the first paragraph of Section 86 "the Court shall make a decree ordering that an account be taken of what will be due to the

plaintiff for principal and interest on the mortgage, and for his costs of the suit, if any, awarded to him, on the day next hereinafter referred to, or

declaring the amount so due at the date of such decree." It is obvious that the words of Section 88---"what is so found due to the plaintiff" must

mean the amount referred to in the first paragraph of Section 86, that is, either the amount found due by the account directed to be taken in that

section, or the amount which the Court at the time of passing its decree declares to be due. It is also obvious that u/s 86 no future interest beyond a

date within six months of the date of the decree can be entered in the account or declared by the Court; and from Section 88 it is obvious that the

proceeds of the sale decreed under that section must be applied, after payment of the expenses of the sale, in payment of "what is so found due to

the plaintiff," and that the balance, if any, must be paid to the defendant or other person entitled to receive the same. The section clearly shows that

it is only the amount originally declared at the time of making the decree or found to be due under the account provided for by Section 86, which

the Court can pay over to the plaintiff out of the proceeds of the sale, and that the Court has no power to allow, in the account u/s 86, or in its

declaration under that section, interest beyond the date which has to be fixed within six months from the date of the decree. In certain events, in

adjusting the amount to be paid to a mortgagee, certain additional costs are to be added u/s 94 of the Act to the mortgage money, but there is

absolutely no provision that we are aware of for adding additional interest.

Now it appears to us that the granting of interest on the costs decreed was in contravention of Section 86. The power exercised by Courts to grant

interest up to realization under the CPC appears, in the case of decrees for sale, to be excluded by Sections 86 and 88 of the Transfer of Property

Act. It would be well if Courts, whether of first instance or of appeal, in cases arising under the Transfer of Property Act, would read and consider

the sections of that Act which contain the law on the subject, which the Legislature in India has thought it necessary to enact. We have no power as

Judges in India to alter the Statute Law, and we have no power to make decrees which are not in accordance with that Statute Law, when the

Statute Law provides for the form of the decree to be made. It is not safe to assume that the law of the Transfer of Property Act is the law which

was administered in the Courts of Chancery in England.

3. On the serious practical inconveniences resulting from this decision it is needless to enlarge, as it is matter of common knowledge that the sale

under a decree invariably and of necessity involves some degree of delay, and that it frequently happens that a postponement is as necessary in the

interest of the mortgagor as of the mortgagee; still this cannot control the proper construction of the Act, if its language is clear and plain. The

sections to which reference seems to have been made in that case are the 86th, 88th and 89th of the Transfer of Property Act, and the 209th and

222nd of the Code of Civil Procedure; but it appears to me that for the purpose of arriving at the true meaning of the Legislature regard must be

had to other parts of both these Codes.

4. Now Section 88 provides:

In a suit for sale, if the plaintiff succeeds, the Court shall pass a decree to the effect mentioned in the first and second paragraphs of Section 86,

and also ordering that, in default of the defendant paying as therein mentioned, the mortgaged property or a sufficient part thereof be sold, and that

the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is so found due to

the plaintiff, and that the balance, if any, be paid to the defendant or other persons entitled to receive the same.

In a suit for foreclosure, if the plaintiff succeeds and the mortgage is not a mortgage by conditional sale, the Court may, at the instance of the

plaintiff or of any person interested either in the mortgage money or in the right of redemption, if it thinks fit, pass a like decree (in lieu of a decree

for foreclosure) on such terms as it thinks fit, including, if it thinks fit, the deposit in Court of a reasonable sum, fixed by the Court, to meet the

expenses of sale and to secure the performance of the terms.

5. To ascertain then the full effect of Section 88 recourse must be had to Section 86 which provides:

In a suit for foreclosure, if the plaintiff succeeds, the Court shall make a decree, ordering that an account be taken of what will be due to the

plaintiff for principal and interest on the mortgage, and for his costs of the suit, if any, awarded to him, on the day next hereinafter referred to, or

declaring the amount so due at the date of such decree, and ordering that, upon the defendant paying to the plaintiff or into Court the amount so

due, on a day within six months from the date of declaring in Court the amount so due, to be fixed by the Court, the plaintiff shall deliver up to the

defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall transfer the

property to the defendant free from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by

derived title, by those under whom he claims, and shall, if necessary, put the defendant into possession of the property.

6. Then Section 89 provides:

If in any case u/s 88 the defendant pays to the plaintiff or into Court on the day fixed as aforesaid, the amount due under the mortgage, the costs, if

any, awarded to him, and such subsequent costs as are mentioned in Section 94, the defendant shall (if necessary) be put in possession of the

mortgaged property but if such payment is not so made, the plaintiff or the defendant, as the case may be, may apply to the Court for an order

absolute for sale of the mortgaged property, and the Court shall then pass an order that such property, or a sufficient part thereof, be sold, and that

the proceeds of the sale be dealt with as is mentioned in Section 88; and thereupon the defendant's right to redeem and the security shall both be

extinguished.

7. It will be seen from the judgment to which I have referred, that, according to the view expressed by the Allahabad High Court, the expression

what is so found due to the plaintiff"" in Section 88 means the amount referred to in the first paragraph of Section 86; in other words that the word

so"" refers not merely to the different heads of indebtedness mentioned in that paragraph, i.e., principal, interest and costs, but also to the date

there indicated. It appears to me that to attribute this force to the word so is opposed to that which is apparent from this first paragraph itself, for it

will be noticed that in that paragraph the expression ""so due at the date of the decree"" must refer to a point of time other than that by reference to

which the account mentioned in the earlier part of the clause is to be taken. This of itself would seem to justify the conclusion that the expression

so found due"" in Section 88 does not necessarily and obviously mean, found due at the date indicated in Section 86.

8. But if one looks at Section 90, it is difficult to reconcile its provisions with the view that a mortgagee is not entitled to subsequent interest. That

section provides that: ""When the net proceeds of any such sale are insufficient to pay the amount due for the time being on the mortgage, if the

balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a decree for such sum.

9. The expression ""the amount due for the time being on the mortgage"" to my mind implies that there is to be an adjustment over and above the

account mentioned in Section 86; and this view receives confirmation from Section 94, which expressly mentions a final adjustment, and also from

the application of the proceeds mentioned in Section 97.

10. On the other hand, if the interpretation applied in the Allahabad case is adopted, a mortgagor would not be entitled to credit in respect of any

subsequent payment made by him, or even in respect of subsequent rents received by a mortgagee in possession, and it would be almost doubtful

whether the proceeds of sale mentioned in Section 89 would be applicable in payment of subsequent costs though mentioned in the earlier part of

the section, because those proceeds are to be applied as mentioned in Section 88; and if the expression "so found due" is to have the meaning

attributed to it at page 177 of the report of that---case it would exclude subsequent costs. With all deference I cannot suppose that such results

could have been intended or is required by the words of the Transfer of Property Act.

11. Then the CPC is not without its bearing on the point.

12. The Transfer of Property Act was passed on the 17th of February 1882, and the CPC a month later, i.e., on the 17th of March in the same

year.

13. In the 4th schedule to the Procedure Code are set out the forms of pleadings and decrees, which Section 644 of the Code ordains shall be

used for the respective purposes mentioned in that schedule; and it is fair to assume that those forms do not exceed that which is permissible. Form

109 contains the plaint to be used in an action for foreclosure and sale, and it is clear from the prayer there stated that in case the proceeds of sale

are insufficient to pay the amount due to the plaintiff, the defendant may be made personally liable to pay interest until realization.

14. Now Section 90, under which this part of the decree is made, does not provide for the payment of such interest, so that the power to include it

in the decree must apparently be derived from Section 209 of the Code of Civil Procedure.

15. If this be so, then the opinion, expressed at page 180 of the report of Amolak Ram v. Lachmi Narain to the effect that Section 209 of the CPC

cannot affect the special provisions of the Transfer of Property Act, would seem to be erroneous. The inference would rather appear to be that the

provisions of the Transfer of Property Act are not exclusive and exhaustive; and, further, that it never was contemplated that a mortgagee in a suit,

which, in its origin at any rate, was founded on equitable principles as firmly established in this Court as in the Court of Chancery in England,

should be mulcted of his interest, when his mortgagor is in default.

16. The conclusion then to which I come is that the Transfer of Property Act does not exclude the allowance of subsequent interest, and I see no

reason for departing from the long continued practice of this Court, sanctioned as it is by the rules of Court, and I accordingly direct that the

decree shall be in the form which has hitherto obtained. The following note furnished by Mr. Belchambers, the Registrar of the Court, Original

Side, in connection with this case, shows the practice which has hitherto obtained in the Calcutta Court.