Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Maharaja of the State of Bharatpur v. *Rani Kanno Dei, from the High Court of Judicature for the North-Western Provinces, Allahabad; delivered the* 10*th November* 1900.

Present at the Hearing:

LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD LINDLEY.
SIR RICHARD COUCH.
SIR HENRY STRONG.

[*Delivered by Lord Hobhouse.*]

This is an Appeal from an order made in execution proceedings. The Plaintiff, now Appellant, is a mortgagee; and the Respondent represents the mortgagor who was Defendant and is dead. The mortgage was made on the 11th December 1882 to secure three lacs of rupees. The mortgagor failed to pay, and the mortgagee filed a plaint which is not in the Record, but which from the Subordinate Judge's recital in his judgment appears to have been of an ordinary nature, praying for payment of principal and interest on a day to be fixed by the Court, and for sale in default of payment. The frame of the suit however, so far as it explains the decree, is most properly taken from the decree itself, on the construction of which the whole case turns.

The decree bears date the 7th January 1886. It will make the discussions on it clearer if the material expressions in it are arranged under separate heads. (*See Rec. pp.* 58, 59.)

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" (*a*) The Plaintiff seeks the following reliefs: " That the principal and interest due up to this " time, together with such further interest as " may accrue due from the date of the filing of " the plaint up to the date of payment, and also " the costs of this suit with interest thereon up " to the date which may be fixed by the Court " may be ordered to be paid;

" (*b*) It is ordered and decreed that the " Plaintiff's entire claim be decreed:

" (*c*) with interest *pendente lite* on the " principal at the rate claimed and costs of the " suit;

" (*d*) The Plaintiff will get future interest at " 8 annas per cent. on the amount of decree and " costs;

" (*e*) Defendant do pay within six months " the sum of Rs. 3,00,000 on account of " principal;"

Then follow directions for payment within the six months of specified sums of money under different heads: I. Interest included in the claim, *i.e.*, up to date of suit; II. Interest *pendente lite* at the rate of 9 per cent.; III. Future interest to 20th January 1886 at 6 per cent.; IV. Future interest to 20th July 1886 at 6 per cent.; V. Costs of suit.

" (*f*) In the event of default in payment of " the entire decretal amount, the hypothecated " property be sold by auction in satisfaction of " the decretal amount by enforcement of the " lien, and in the event of any portion of the " decretal amount remaining unpaid, the " balance of the decretal amount be recovered " from the other property of the debtor " deceased."

The Plaintiff has made applications for execution from time to time under which he has realised large sums. The last application was

made on the 14th April 1896, and on that occasion the Defendant for the first time raised the objection that according to the decree no interest is payable subsequently to the day fixed for payment of the specified sums, viz. the 20th July 1886.

On the 25th September 1897 the Subordinate Judge, who was not the Judge who made the decree of 1886, allowed the objection. His reason is given thus:

"It is an admitted fact that the Plaintiff claims to recover "interest even after the 20th of July 1886, which was the "date fixed by the Court for the payment of the mortgage "money under Section 88 of Act 4 of 1882. I have read the "judgment and the decree of the original suit and they are as "clear and specific in awarding interest to the Plaintiff up to "the 20th of July 1886 as could be desired. Neither of "these documents admit of any doubt, and I hold that "according to those documents the decree-holder is entitled to "interest up to the 20th of July 1886, but not after that."

The learned Judge does not further examine the language of the decree, but his decision that it excludes interest after the 20th July 1886 can only be supported by holding that the enumeration of sums specified under Head (*e*) to be paid on that day in order to avoid a sale under Head (*f*) has the effect of cutting down the general terms of Heads (*a*) (*b*) (*c*) (*d*) which if not so cut down would give interest to the day of payment.

On appeal the High Court affirmed the decision of the Subordinate Judge. The learned Judges take a different line of reasoning. They do not find the decree so clear against the Plaintiff as it appeared to the Subordinate Judge. Their difficulties, and with them the precise ground of their decision will be best stated in their own words:—

"Thus we have before us a decree upon which the decree-"holder places one interpretation and the judgment-debtor "another and a totally different interpretation. Each claims "that the interpretation for which he or she contends is "authorised by the operative words of the decree. We have

" tried to see if those words are capable of being so read
" as to leave no room for doubt in the mind of the Court
" executing it, what the intention of the Court was which
" passed the decree. The words by themselves are not a
" sufficient guide. In one part they seem to point to an
" intention of the Court to grant all that the decree-holder
" asked for in his plaint. In another part details are given
" which cover each portion of the relief asked for with the
" exception of interest to date of payment, and thus the two
" parts are at conflict. The decree-holder urges that at the
" time of passing the decree the Court could not have possibly
" entered any detailed sum as representing what might
" eventually be due under this head. True, but we should
" expect that a Court which went into such details as the
" Court passing the decree did, would not if it had intended to
" grant interest subsequent to the date (20th July 1886) have
" omitted to say, ' together with future interest at 6 per cent.
" ' to date of payment,' or words to similar effect. In the face
" of this conflict we are in the same position as the learned
" Judges who had to put an interpretation on the decree in
" *Lachmi Narain* v. *Amolak Ram and Another* (see *Amolak*
" *Ram* vs. *Lachhmi Narain*, I. L. R., 19 All., 174). In that
" case the learned Judges held, 1st, that where it is possible
" to do so the construction to be placed upon a decree is that
" construction which would make the decree one in accordance
" with the law; and 2ndly, that if a decree goes beyond what
" the law allows and leaves no room for doubt as to the con-
" struction to be placed upon it, then the Court executing the
" decree has no option but to execute it for the sum decreed,
" even though it be a sum beyond what the law allows."

In the case referred to it was laid down that under Sect. 88 of the Transfer of Property Act, which prescribes the nature of the decree to be made in a suit by a mortgagee for sale, it is not competent for the Court to give interest beyond the day fixed for payment into Court of the amount declared necessary to effect redemption and to avoid sale. The view of the High Court then is quite clear in its application to the decree in this suit. They think that the specifications under Head (*e*) are inconsistent with the results which would otherwise follow upon Heads (*a*) (*b*) (*c*) and (*d*); there is therefore a serious ambiguity in the decree: and they are bound to incline to that construction which would make it in accordance with law, rather than to the opposite one.

Their Lordships agree that all ambiguous documents should be construed rather to make them accord with law than to make them conflict with it. But they are unable to see any such ambiguity in this decree as to call for the application of that principle. In their view the foundation of the decree is contained in Head (*b*). That head decrees the entire claim of the Plaintiff. The claim so decreed is set forth in Head (*a*). It is principal and interest due to the date of the plaint, plus interest to accrue due between the date of the plaint and the date of payment, plus the costs of suit with interest thereon up to the date which may be fixed by the Court. The Plaintiff seeks that all this shall be ordered to be paid. The sentence is not happily constructed, but such is the reasonably clear outcome of it. Then Heads (*c*) and (*d*) mention interest subsequent to date of suit. There is a reason for that, because the sums of interest allowed, first up to date of suit, secondly between that date and the decree (*pendente lite* as it is called) and thirdly after decree, differ in point of rate. All the same these two heads are included in the Plaintiff's entire claim. Then comes Head (*e*). In it the Court calculates beforehand, instead of leaving for subsequent account, the amounts which the mortgagor must pay on 20th July in order to redeem his property and avoid a sale. If he does not pay, the further part of the decree Head (*f*) is to be executed. But there is nothing to say that if the mortgagee is kept out of his money beyond 20th July he is not to have interest upon it; nor any intimation that the Court considered the relief given by the first four headsto be restricted by Head (*e*). As then there is no inconsistency, the duty of the executing Court is, as the High Court rightly points out, to carry the orders of the decree into effect, as being conclusive between the parties whether it may or may not be disputable in point of law.

Apart from the question whether the Court could lawfully give interest to the day of payment, the only difficulty of construction suggested by the learned Judges is the omission of words equivalent to "with future interest to "the day of payment." But it is not clear what difficulty this omission creates, nor at what point those words should be expected to come in. They could not come into head (*e*) because that relates only to the period terminated by the 20th July. Head (*f*) does not specify any particulars but uses the term "decretal amount." It is true that the term is used rather loosely, and has to be applied to subsequent changes of event. On its first appearance it does mean the sums specified under head (*e*) because it is then referring to the 20th July, the critical moment which is to determine whether there shall be redemption or sale. On its subsequent appearances the Court might with propriety have used the words the omission of which has struck the High Court as strange. But there is no inconsistency or indeed difficulty in supposing that the term "decretal amount" means the amount due whenever the decree is speaking or being called into action under heads (*a*) (*b*) (*d*). It is far more difficult to suppose that the Court, though contemplating a sale, and more than one sale, with the inevitable delays, before the debt could be got in, should at each successive time have considered the "decretal amount" to be the amount required on 20th July in order to avoid any sale at all.

This view of the decree is sufficient to decide the present Appeal. But a question of such great and general importance has been raised by the judgment of the High Court that their Lordships cannot with due regard to public convenience avoid passing an opinion on it. If the effect of the Transfer Act be as alleged, it works a startling abridgment of the remedies of

mortgagees as previously understood. So far as appears from reported cases, or from anything known to the Counsel who argued this Appeal, it was a new discovery in the year 1896 when the case of *Amolak Ram* was decided, and when the execution now under discussion was applied for. It is therefore not surprising that other Courts should have felt difficulty in following the Allahabad decision.

Mr. Mayne rather flatly refused to argue his case on the ground that the decree of 1886 would be illegal if construed in favour of the Plaintiff's view. But the authorities cited by Mr. Ross show strong judicial reasons against taking such a ground. To the report of *Achalabala Bose* v. *Surendra Nath Dey* 24 Calc. 766 there is appended a note by the Registrar of the High Court of Calcutta setting forth the rules of that Court and the practice under them, and the effect which the principle of the Allahabad decision would produce on the prevailing views of mortgagees' rights. When the last-named case came to be decided, which was in July 1897, the Calcutta High Court pointed out not only a departure from received practice in the Allahabad view of Section 88 of the Transfer Act, but its inconsistency with Section 97 of that Act, and with the form of suit sanctioned by No. 109 in the 4th Schedule of the Procedure Code of 1882. And on this more extended view of the law they decided that the prevailing practice is a lawful practice, and that Section 88 should be construed so as not to interfere with it. The same question came before the High Court of Madras in the case of *Subbarayar* v. *Ponusami* 21 Madras 364 (October 1897) when that Court expressed dissent from the Allahabad decision.

In the recent case of *Bakar Sajjad Ali*, reported 21 Allahabad p. 361, the High Court

of Allahabad itself overruled the decision in *Amolak Ram's* case. Perhaps they rested undue weight on a decision of this Board. It is true that in the case of *Rameswar Koer*, reported in 26 Calc. p. 43, and decided in July 1898, this Board upheld the High Court of Calcutta in awarding interest subsequent to the date fixed for payment by the mortgagor, which would have been wrong if the decision in *Amolak Ram* had been right. But that point was not raised, and probably never was thought of by anybody until *Amolak Ram's* case came to be known, so that the decision of this Board is rather a proof of the prevalence of doctrines contrary to the principle of *Amolak Ram* than a conscious pronouncement against it. Nevertheless the Allahabad Judges in giving their decision add a reason of their own for overruling *Amolak Ram*, which seems to their Lordships of importance, to the effect that the object of fixing a day for payment by the mortgagor is for the purpose of assigning a definite time at which the mortgagor's right of redemption is to cease, and the mortgagee's right to foreclose or sell is to attach, and not for the purpose of staying the payment of interest.

It must be admitted that the language of Sect. 88 is calculated to cause difficulty, and a sort of difficulty which is a common cause of conflict in judicial interpretations of new statutes. It looks as if the draftsman of the Transfer Act had overlooked the difference between a foreclosure and a sale, and had forgotten that in the former case interest stops because the mortgagee gets the property in lieu of his debt, whereas a sale must be subject to some substantial delay, and in many cases is subject to long delays. However that may be, there is the difficulty, and if Sect. 88 could be looked at as an isolated enactment quite detached from other legal considerations, it

would be hard to construe it otherwise than was done by the Allahabad Court in the case of *Amolak Ram.* But considering the universality of the long established practice, its continuance for years after the Transfer Act was passed, the manifest justice of it, the lack of any apparent reason for upsetting it, the conformity with it of Sect. 97 which is in *pari materiâ* with Sect. 88, the presumption that Sect. 88 was framed with reference not to the running of interest but to the determination of the time for redemption or sale alternatively, and the form of suit sanctioned by the Procedure Code, their Lordships have no hesitation in expressing their concurrence with the Courts of Calcutta and Madras, and with the ultimate decision of the Court of Allahabad.

Their Lordships are of opinion that the order appealed from and that of the Subordinate Judge should be discharged, and that the case should be remitted to the Subordinate Judge for execution of the original decree with a declaration that, according to the proper construction of that decree, the Plaintiff is entitled to interest at 8 annas per cent. up to the date of payment. The Plaintiff should have his costs in both Courts. Their Lordships will humbly advise Her Majesty to pass an order accordingly, and the Respondent must pay the costs of this Appeal.