

**(1893) 05 CAL CK 0007**  
**In the Calcutta High Court**

Jadub Lall Shaw Chowdhry

APPELLANT

Vs

Madhub Lall Shaw Chowdhry and Others

RESPONDENT

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**Date of Decision :** 12-05-1893

**Acts Referred:**

Transfer of Property Act, 1882 — Section 67, 99

**Citation :** (1893) ILR (Cal) 34

**Hon'ble Judges :** Macpherson, J; Banerjee, J

**Bench :** Division Bench

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**Judgement**

Macpherson and Banerjee, JJ.—The only question that arises in this case is whether a person who holds the mortgage of any property can sell that property in execution of an ordinary money decree in satisfaction of a claim not arising under the mortgage. The Court below has answered the question in the negative, holding that Section 99 of the Transfer of Property Act limits the rights of the decree-holder in such a case, and provides that he shall not bring the mortgaged property to sale otherwise than by instituting a suit u/s 67 of that Act. It is now contended before us in appeal on behalf of the decree-holder that the order of the Court below is wrong, and that Section 99 of the Transfer of Property Act, though apparently very general in its terms, must receive a limited construction, as otherwise anomalies and injustice would result such as the Legislature could never have intended.

2. It is argued that the application of Section 99 should be limited to those cases where the decree sought to be executed by the mortgagee is based on a claim which arises under, or is connected with, the mortgage; and the concluding portion of the section is referred to in support of this view, and it is urged that Section 43 of the Code of Civil Procedure, from the operation of which the suit required to be instituted u/s 67 of the Transfer of Property Act is excepted, can have no application to such a suit, unless the claim on which the decree is based arises out of, or is connected with, the mortgage. This argument assumes that the suit required to be instituted u/s 67 is a suit on the mortgage held by the

decree-holder. We shall suppose that this assumption is correct, and examine the soundness of the argument on that supposition.

3. We do not think that the concluding words of Section 99 can be taken as indicating any limitation of the scope of the section in the manner contended for, when the section is made expressly applicable to decrees for the satisfaction of "any claim, whether arising under the mortgage or not." The concluding portion of the section is intended to except the suit required to be instituted from the operation of Section 43 of the CPC only in those cases where the last-mentioned section would apply, that is, upon the assumption in the appellant's argument, in cases in which the decree is based on a claim arising under the mortgage. The construction contended for on behalf of the appellant is opposed to the plain meaning of the words of the section quoted above.

4. Nor are the anomaly and the injustice which it is said would result from the natural construction of the section such as would justify us in putting a forced construction upon it. It has been contended (assuming the suit required by Section 99 to be one on the mortgage) that the decree-holder may not be in a position to institute any suit u/s 67 for years to come, by reason of the mortgage not falling due; and if the debtor has no other property except that covered by the mortgage, it would be unjust to the decree-holder to prevent him from realizing his just dues, when such realization by the sale of the mortgagor's equity of redemption with him being proclaimed can lead to no harm to any one. One answer to this argument would be this : that the injustice complained of must be confined to a limited class of cases, namely those in which the decree is based upon claims arising from tort, as in cases where it is based upon claims arising from contract, the party who seeks to enforce the claim can always protect himself when entering into the contract. On the other hand, the object intended to be secured by Section 99 appears to be that mortgaged property should not be allowed to be brought to sale by the mortgagee in execution of any money decree held by him, except by a suit u/s 67, to which every other encumbrancer must u/s 85 be a party, and the sale that may be ordered will be free of his encumbrances, and will thus fetch fair value, and will not be likely to be followed by the embarrassing litigation which not unfrequently forms the sequel of the sale of an equity of redemption.

5. We have hitherto accepted as correct the assumption in the appellant's argument that the suit required by Section 99 to be instituted u/s 67 is a suit on the mortgage.

6. The language of Section 99 is, however, not very clear, and it was suggested by the learned Counsel for the respondents that the suit therein required to be instituted may be a suit based on the charge created in favour of the decree-holder by the attachment, Section 100 making provisions relating to mortgagee's instituting suits applicable to persons having a charge. If this view is correct, the argument based upon the reference to Section 43 of the CPC and upon the injustice of delaying decree-holders will lose all its force. But it is not

easy to see what object would be gained by such a suit, when the sale to be ordered by it cannot without the consent of the mortgagee, when the mortgage is of a prior date, be free of the mortgage (see Section 99 of the Transfer of Property Act).

7. It is not necessary, however, to decide in this case whether the suit required to be instituted by Section 99 is a suit on the mortgage, or is one on the charge created by attachment. Neither the one suit nor the other was brought by the present decree-holder.

8. The case of *Devendra Nath Sanyal v. Chandra Kishore Munshi* ILR Cal. 436 cited for the appellant, is clearly distinguishable from the present one, as that was a case in which the decree sought to be executed was passed before the Transfer of Property Act came into operation, and was a decree authorizing the sale of the mortgaged property and not a mere money decree, such as is sought to be enforced in this case.

9. For the foregoing reasons, the construction put by the Court below on Section 99 is, in our opinion, correct, and this appeal must accordingly be dismissed with costs.