

**(1912) 07 CAL CK 0027**  
**In the Calcutta High Court**

Tara Chand Marwari

APPELLANT

Vs

Brojo Gopal Mukerji

RESPONDENT

---

**Date of Decision :** 23-07-1912

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 34 Rule 4

**Citation :** 18 Ind. Cas. 747

**Hon'ble Judges :** Holmwood, J;Asutosh Mookerjee, J

**Bench :** Division Bench

---

## Judgement

1. This is an appeal by the third defendant against the decree in a mortgage suit. The decree has been assailed substantially on three grounds, first, that interest at the contract rate ought not to have been allowed up to the date fixed for re-payment in the decree, that is, the 22nd March 1911; secondly, that there should not have been a personal decree against the appellant; and thirdly, that in the accounts taken on the foot of the mortgage, the burden of the latrine taxes and the Municipal rate should not have been thrown upon the property in the hands of the appellant.

2. In so far as the first ground is concerned, it is necessary to mention that the suit was commenced on the 2nd November 1905 to enforce a security which had been executed in favour of the plaintiff by the first two defendants on the 9th May 1902. The third defendant, now appellant before this Court, was joined as a party defendant, as transferee of an interest in the equity of redemption. On the 22nd December 1906, the Subordinate Judge made the preliminary decree in the suit, whereby he directed accounts to be taken and fixed the 22nd June 1907 for re-payment of the mortgage dues. The decree-holder was directed to file the accounts within a month, as he was himself in possession of one of the mortgage premises and was liable in respect thereof to pay rent to the mortgagors. The plaintiff was not satisfied with this decree and lodged an appeal in this Court on the 11th January 1907. That appeal was dismissed on the 6th January 1910. The matter was then taken up by the Subordinate Judge, and reference was made to

a Commissioner to take the accounts directed. The Commissioner submitted his report, and after objections thereto had been heard, the final decree was made on the 22nd September 1910. By this decree, interest at the contract rate, that is, compound interest at 15 per cent. per annum with half-yearly rests, has been allowed up to the date fixed for re-payment, that is, the 22nd March 1911, To this, exception has been taken by the third defendant, and it has been contended that interest at the contract rate ought to have been allowed only up to the date fixed for repayment by the original decree of the Subordinate Judge, that is, up to the 22nd June 1907. On behalf of the respondent, it has been argued that under Order XXXIV, Rule 4 of the CPC of 1908, which re-replaces Section 88 of the Transfer of Property Act, the decree-holder is entitled to interest at the contract rate up to the date fixed for re-payment in the final decree as now made. In support of this position, reliance has been placed upon the cases of Noor Ali Chowdhuri v. Koni Meah 13 AC. 13; Nam Narain Singh v. Lala Roghunath Sahai 22 AC.467; Rup Chand v. Shamsul Jehan 11 AC. 346; A.W.N. (1889) 127; Daulat Jagjivan v. Bhukandas Manekchand 11 B. 172 and Nanchand v. Vithu 19 B. 258. Reference has also been made to the cases of Maung Aung Ban v. Ma Nanko 3 Bur. L.T. 134; 8 Ind. Cas. 961 and Maung Pye v. Ma Than 3 Bur. L.T. 2; 8 Ind. Cas. 592. We are of opinion that the contention of the respondent is unsound and must be overruled. It may be conceded that, as ruled by their Lordships of the Judicial Committee in the case of Sundar Koer v. Rai Sham Krishen 34 AC. 150; 34 I.A. 9; 4 A.L.J. 109; 11 C.W.N. 249; 5 C.L.J. 106; 17 M.L.J. 43; 9 Bom. L.R. 304; 2 M.L.T. 57. the mortgagee is entitled to interest on the principal amount at the contract rate up to the date fixed by the Court for repayment of the mortgage debt; but the question arises, whether the mortgagee can get the period extended by means of an unsuccessful appeal against the decree of the primary Court. The cases of Noor Ali v. Koni Meah 13 C. 13 and Nam Narain Singh v. Lala Roghunath Sahai 22 C.467 are clearly distinguishable. They were cases in which a decree for ejectment had been made against tenants who had forfeited their tenancy, and it was held that it was competent to the Court, in view of the fact that the tenant had preferred an appeal against the decree for eviction, to extend the time within which the tenant should be allowed to relieve himself against the forfeiture. These cases do not in any way assist the respondent; if we were to accede to his contention, the result would follow that the plaintiff, by means of an infructuous appeal, could always throw an additional burden upon the mortgagor defendant. This view is clearly opposed to the decisions of this Court in the cases of Bhola Nath Bhattacharjee v. Kanti Chundra Bhattacharjee 25 AC. 311; 1 C.W.N. 671 and Faijuddi Sardar v. Asimuddi Biswas 11 C.W.N. 679. It may further be pointed out that although there are cases, which may apparently support the contention of the respondent, Rup Chand v. Shamsul Jehan 11 A.C 346; A.W.N. (1889) 127; Daulat Jagjivan v. Bhukandas Manekchand 11 B. 172; Nanchand v. Vithu 19 B. 258; Kanara, Kurup v. Gobinda Kurup 16 M. 214; 3 M.L.J. 89 the balance of authority is clearly against his view: Ramaswami Kone v. Sundara Kone 31 M. 28; 3 M.L.T. 26; 17 M.L.J. 495; Puthenpura v. Puthenpura 1 M.L.J. 745; Manavikraman v. Unniappan 15 M. 170;

2 .L.J. 23; Mahant Ishwergar v. Ishwar Chudasama Mamanabhai 13 B. 106; Patloji v. Ganu 15 B. 370; Chudasama v. Mahant Ishwargar 16 B. 243; Aminabi v. Sidu 17 B. 547 and Chiranjilal v. Dharam Singh 18 A. 455; A.W.N. (1896) 130. The general rule is that the time allowed to the mortgagor will not be enlarged, merely because an appeal is preferred against the decree, whether by the mortgagor or the mortgagee, which is afterwards dismissed or withdrawn. It is unnecessary, for our present purpose, to consider whether there may or may not be exceptions to this rule; it is sufficient to hold that in a case of the description now before us, where the mortgagee himself prefers an unsuccessful appeal and the mortgagor does not ask for extension of time to enable him to redeem, it is not open to the mortgagee to demand interest at the contract rate up to a date within six months of the date of the final decree. As we have already stated, if the contrary view were maintained, he would be at liberty, by means of a frivolous appeal, to throw an additional burden upon the mortgagor for which the latter cannot justly be held responsible. The first contention of the appellant must, consequently, succeed.

3. In so far as the second ground is concerned, it has not been seriously argued on behalf of the respondent that the personal decree against the appellant can be supported. He is purchaser of a portion of the equity of redemption; the property in his hands is liable for the satisfaction of the mortgage debt; but he in no way represents the mortgagor personally, and a personal decree cannot be made against him: Jamna Dass v. Ramautar Pande 31 A.C 352; 6 A.L.J. 427; 2 Ind. Cas. 460; on appeal 39 I.A. 7; 15 C.L.J. 68; 16 C.W.N. 97; 11 M.L.T. 6; 9 A.L.J. 37; (1912) M.W.N. 32; 14 Bom. L.R. 1; 21 M.L.J. 1158; 34 A.C 63; 13 Ind. Cas. 304. The second ground on which the appeal is pressed must, therefore, prevail.

4. In so far as the third ground is concerned, it cannot plainly be sustained in view of the decision of the Subordinate Judge at the preliminary stage. Against that decree, in so far as it was in favour of the mortgagee, no appeal was preferred by the defendant to this Court. To that extent, that decree must be deemed to have become final and can no longer be successfully challenged. The third ground, therefore, fails.

5. The result is that this appeal is allowed in part and the decree of the Court below is modified in two respects. Interest at the contract rate will be allowed only up to the 22nd June 1907, which will be treated as the date fixed for redemption in the decree; there after interest will run at the rate of six per cent. per annum on the aggregate amount found due. The personal decree against the appellant is set aside. Subject to variations upon these two points, the decree of the Court below will be affirmed and a self-contained decree drawn up in this Court.

6. The appellant is entitled to the costs of this appeal. We assess the hearing fee at five gold mohurs. The Court-fee will be allowed only on the amount by which the decree is reduced.