
(1918) 11 MAD CK 0020
In the Madras High Court

Venkatachallapathi Aiyar and Another	APPELLANT
Vs	
Thavasi Servai (deceased) and Others	RESPONDENT

Date of Decision : 27-11-1918

Acts Referred:

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

Citation : (1919) ILR (Mad) 465 : 51 Ind. Cas. 67 : (1919) 36 MLJ 288

Hon'ble Judges : Oldfield, J;Abdur Rahim, J

Bench : Full Bench

Judgement

Abdur Rahim, J.—I do not think the Subordinate judge was right in treating the provision for payment of interest at 12 per cent in default of

payment on the date fixed in the mortgage bond, as penal. The original rate fixed no doubt is 9 per cent. But it is to be borne in mind that the debts

to discharge which this mortgage was executed, carried interest at 12 per cent and more. It could not therefore, be said that the mortgagees were

not justified in stipulating for payment of a higher rate, if the money was not paid as promised.

2. The second question raised by the appeal is one of some importance. It is whether in a mortgage decree for sale interest should be computed on

the aggregate amount found to be payable on the date fixed for redemption, that is, consisting of principal, interest and costs, or only on the

principal, if the ascertained amount is not paid and property has to be sold in consequence. The matter is now governed by Order XXXIV, Rule 4

Civil Procedure Code, which read along with Rule 2 provides that in case of default the sale proceeds of the property sold shall be applied in

payment of what is declared due to the plaintiff for principal and interest on the mortgage and for costs of the suit until the date fixed for payment

together with subsequent interest and subsequent costs. This prima facie suggests that the subsequent interest is payable on the aggregate amount and not on the principal-alone. The form appended to this rule, form No. 4 of App. D to the 1st Schedule of the Code clearly proceeds upon this above interpretation. But in forms No. 7, 8 and 9 which are forms of decrees for sale in cases where there are more than one mortgage, on this property, provision is made for payment of such subsequent interest and costs as may be allowed by the court. These forms certainly suggest that the rate of such subsequent interest is left to the discretion of the court and probably also that the court may in a proper case refuse to allow any further interest.

3. Before the present Civil Procedure Code, the subject was dealt with in the Transfer of Property Act, and the question arose as to whether the court had the power to allow interest at all for any period subsequent to the date fixed for payment and as to the proper rate. The Privy Council held in *Sundar Koer v. Rai Sham Krishen* ILR (1906) C. 150 that the Calcutta practice of allowing such interest at the court rate, also adopted in this Court, in *Subbaraya Ravuthaminda Nainar v. Ponnusami Nadar* ILR (1897) M. 864 was right, contrary to the view of the Allahabad High Court in *Amolak Ram v. Lachmi Narain* ILR (1896) A. 174. Their Lordships at page 161 also observed, "They think that the scheme and intention of the Transfer of Property Act was that a general account should be taken once for all, and an aggregate amount be stated in the decree for principal, interest and costs due on a fixed day, and that after the expiration of that day, if the property should not be redeemed, the matter should pass from the domain of contract to that of judgment, and the rights of the mortgagee should thenceforth depend, not on the contents of his bond but on the directions in the decree. It will be observed that according to the practice explained by the Registrar (that is of the Calcutta High Court), which has been followed in this case, the interest is allowed on the aggregate sum, and not merely on the principal money, and this is right if the mortgagee is treated as a decree-holder or judgment-creditor, but would be wrong if the right to the interest depended on the terms of the mortgage-bond. No doubt this reasoning intended to prove that the contract rate was not to be given, but it contains all the same a clear dictum

that the practice in Calcutta of allowing interest on the aggregate sum was right.

4. I have tried to ascertain the practice in the Courts of this Presidency with reference to this matter. It would seem that in the mofussil courts the

practice cannot be said to be consistent or uniform. When the High Court in its appellate jurisdiction passes a mortgage decree for sale, the

practice seems to be to allow interest at the court rate of 6 per cent on the aggregate amount. On the Original Side the practice is to provide in the

final order for sale, for such subsequent interest and costs as may be allowed by the court, and I understand that an application for the

determination of such interest is generally made at the time of confirmation of the sale, The conclusion that I am led to, is that in default of

redemption by payment on the date fixed, subsequent interest is to be calculated both on the principal and interest declared or found to be payable

on that date, and such further interest is ordinarily to be calculated at 6 per cent. but the court has a discretion in the matter.

5. The English Law was also discussed at the bar, and so far as I can gather the practice of the English Courts in a foreclosure action is to compute

subsequent interest on the aggregate amount, but in other actions such as by way of administration subsequent interest is allowed only on the

principal amount, apparently out of consideration for other creditors of the mortgagor. This is what is to be deduced from *Harris v. Harris* 3

Atkyins 721 *Whatton v. Cradock* 1 *Keen* 267 : 48 E.R. 309 *Brewin v. Austin* 2 *Keen* 211 and *Elton v. Curties* 19 Ch. D. 49. But in my opinion a

question like this has to be determined with reference to the provisions of the CPC and the practice of the Courts in this Presidency, if there is a

uniform and well established practice.

6. There seems to be no special reasons in this case why interest should not have been allowed on the amount found to be due on the date fixed,

and I think that such interest should be allowed at the rate of 6 per cent.

7. The decree of the Subordinate Judge will therefore be modified by allowing interest from the date of default at 12 per cent, instead of 14 annas

per mensem decreed by the Subordi mate Judge, and also by calculating interest at the rate of 6 per cent on the aggregate amount, that is, principal

and interest calculated as indicated above and on costs, and not merely on the amount of principal as decreed by the Subordinate judge, from the

date fixed for payment, that is 28th February 1918, until realisation. The respondents will pay the appellants the costs of this appeal.

Oldfield, J.

8. I agree.