

words "but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right," do not imply that the applicant is not at liberty to institute a suit in the ordinary manner in respect of any other right than that to which the application related. In the present case the application for leave to sue as a pauper was merely in respect of the personal remedy of contribution, and there was no claim to enforce the charge created by section 95 of the Transfer of Property Act. The present suit is a suit to enforce that charge, and there is nothing in section 413 which could be held to bar it. That is all that is necessary to say about section 43 of the Code. As to the question of limitation the learned Judge is right in holding that Art. 132 is applicable. As we disagree with the learned Judge's view of the effect of section 43 on which his decree is based, we must allow this appeal. We set aside the decrees of both the lower Courts and remand the suit to the Court of first instance for disposal on the merits. Costs of the appeal in the lower appellate Court and in this Court will be paid by the respondent. The costs of the first Court will abide the event.

Appeal decreed and cause remanded.

FULL BENCH.

Before Sir Arthur Strachey, Knight, Chief Justice, Mr. Justice Know, Mr. Justice Blair, Mr. Justice Banerji and Mr. Justice Aikman.

BAKAR SAJJAD (JUDGMENT-DEBTOR) v. UDIT NARAIN SINGH
(DECREE-HOLDER).*

Execution of decree—Construction of decree—Act No. IV of 1882 (Transfer of Property Act), sections 86, 88, 89—Decree for sale on a mortgage—Interest allowable after date fixed by decree for payment of the mortgage money.

A Court executing a decree the terms of which are ambiguous should, where it is possible, put such a construction upon the decree as would make it in accordance with law. *Amolak Ram v. Lachmi Narain* (1), *Pirbhu*

* First Appeal No. 96 of 1898 from an order of Rai Pandit Indar Narayan, Subordinate Judge of Farrukhabad, dated the 15th January 1898.

(1) (1896) I. L. R., 19 All., 174.

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Narain Singh v. Rup Singh (1) and *The Maharaja of Bhartpur v. Rani Kanno Dei* (2) *quoad hoc* approved.

But in construing a decree for sale upon a mortgage, the terms which are susceptible of being construed either as allowing interest only up to the date fixed by the decree for payment of the mortgage-debt or as allowing interest also after that date until realization, the proper construction, to make the decree in accordance with law, is that interest is allowed up to the date of realization and not merely up to the date fixed by the decree for payment of the mortgage-debt. *Amolak Ram v. Lachmi Narain* (3), *Nain Dat v. Harihar Dat* (4) and *The Maharaja of Bhartpur v. Rani Kanno Dei* (2) as to this point overruled.

Achalabala Bose v. Surendra Nath Dey (5) and *Subbaraya Ravuthaminda Nainar v. Ponnusami Nadar* (6) referred to. *Rameswar Koar v. Mahomed Mehdi Hossein Khan* (7) followed.

THIS was an appeal arising out of an application for execution of a decree under section 88 of the Transfer of Property Act. The facts of the case will be found set forth in detail in the judgment of the Chief Justice, and it is only necessary to state here that the question before the Full Bench was whether the Lower Court was right in allowing the decree-holder respondent's claim for interest up to the date of the application, that is to say, interest after the date fixed by the decree for payment of the mortgage money, and in disallowing the judgment-debtor appellant's objection that interest was only payable under the decree up to the said date.

Munshi *Gulzari Lal* for the appellant.

The decree in this case under section 88 of the Transfer of Property Act only provides for payment of the sum found due with interest at the rate mentioned therein on 31st December 1892, the date fixed by the Court for payment. The decree is silent as to payment of any interest after that date. A Court executing the decree cannot by a mere process of interpretation add to the terms of the decree—*Forester v. Secretary of State for India* (8).

The terms of the order absolute, dated 29th June 1873, awarding interest after the date fixed for payment are immaterial because the decree to be executed is still the decree under section 88 of

(1) (1898) I. L. R., 20 All., 397.

(2) Weekly Notes, 1898, p. 164.

(3) (1896) I. L. R., 19 All., 174.

(4) (1897) Weekly Notes, 1898, p. 57.

(5) (1897) I. L. R., 24 Calc., 766.

(6) (1897) I. L. R., 21 Mad., 364.

(7) (1898) I. L. R., 26 Calc., 39.

(8) (1877) L. R., 4 I. A., 137.

the Transfer of Property Act—*Raj Kumar v. Bisheskar Nath* (1); *Amolak Ram v. Lachmi Narain* (2); *Koshi Prasad v. Sheo Sahai* (3); *Oudh Bihari Lal v. Nageshar Lal* (4). A Court in passing an order absolute for sale has only to see whether the amount payable under the decree has been paid or not, and to order sale. Interpretation of the terms of the decree is beyond its scope, especially in a case like the present, where no payment has been made. Anything contained in the order absolute for sale cannot have the effect of *res judicata* in future execution proceedings *Shib Charan v. Raghu Nath* (5). The point now raised was never raised and determined by the Court directly between the parties after due notice—*Sheik Budan v. Ramchandra Bhunjgaya* (6); *Ram Lal v. Narain* (7); *Shafaat Begam v. Hurmat Sultan Begam* (8); *Madho Prasad v. Daryai Bibi* (9); *Nathu Ram v. Muhammad Ali Khan* (10).

Mr. E. Chamier, for the respondent.

The decree *nisi* provides for future interest, but does not state clearly up to what date such interest shall be paid. The decree *nisi* should, if possible, be construed as a decree prepared in accordance with law, see *Amolak Ram v. Lachmi Narain* (2) and *Pirbhu Narain v. Rup Singh* (11). As to what interest a decree under section 88, Act IV, 1882, should provide for, see the decision of the Privy Council in *Rameswar Koer v. Mahomed Mehdi Hossein Khan* (12), also *Achalabala Bose v. Surendra Nath Dey* (13) and *Subbaraya Ravuthaminda Nainar v. Ponnusami Nadar* (14). The decision of this Court in *Amolak Ram's* case is no longer of authority in view of the decision of the Privy Council. The decree *nisi* now in question is capable of being construed as making provision for interest up to the date of realization and should be so construed.

(1) (1894) I. L. R., 16 All., 270.

(2) (1896) I. L. R., 19 All., 174.

(3) (1896) Weekly Notes, 1897, p. 12.

(4) (1890) I. L. R., 13 All., 278.

(5) (1895) I. L. R., 17 All., 174.

(6) (1887) I. L. R., 11 Bom., 537.

(7) (1890) I. L. R., 12 All., 539.

(8) Weekly Notes, 1895, p. 15.

(9) Weekly Notes, 1895, p. 108.

(10) Weekly Notes, 1895, p. 119.

(11) (1898) I. L. R., 20 All., 397.

(12) (1898) I. L. R., 26 Calc., 39.

(13) (1897) I. L. R., 24 Calc., 766.

(14) (1897) I. L. R., 21 Mad., 364.

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Next it is the duty of the Court which prepares the order absolute under section 89 of Act No. IV of 1882 to construe the decree *nisi* and from the order absolute accordingly—the order absolute cannot be challenged at any later stage of the proceedings in execution, see *Badshah Begam v. Musammat Hardei* (1) and *Perbhu Narain Singh v. Rup Singh* (2). The order absolute in this case clearly provides for future interest and was never challenged till the publication of the decision in *Amolak Ram's* case. The principle of explanation II to section 13, Civil Procedure Code, applies.

The order absolute was prepared after notice to the judgment-debtors; notice was again issued to them under section 287, Civil Procedure Code, previous to the preparation of the proclamation, see clause (d) of that section. The matter is now *res judicata*. *Ram Kirpal Shukul v. Rup Kuari* (3) *Mungul Pershad Dichit v. Grija Kant Lahiri Chowdhry* (4). The case of *Sheikh Budar v. Ram Chandra* (5) is distinguishable.

Lastly, the judgment-debtor, appellant, has obtained adjournments of the sale, at the same time agreeing that the proclamation shall stand and has filed petitions admitting evidently that the amount due includes interest up to the date of realization. He is now estopped from raising the question of interest. He cannot rip open the proceedings of six years. See *Girdhari Singh v. Hurdeo Narain Singh* (6) and *Arunachellam v. Arunachellam* (7).

Munshi Gulzari Lal in reply. In *Rameswar Koer v. Mahomed Mehdi Hossein Khan* (8) their Lordships of the Privy Council never meant to decide the point which is now under discussion. The question before their Lordships simply related to the rate of interest to be allowed in a mortgage-decree between the date of the institution of the suit and the date fixed for payment. They held that interest at the contractual rate was

(1) (1897) Weekly Notes, 1898, p. 17.

(2) (1898) I. L. R., 20 All., 397.

(3) (1883) L. R., 11 I. A., 37.

(4) (1881) L. R., 8 I. A., 123.

(5) (1887) I. L. R., 11 Bom., 537.

(6) (1876) L. R., 3 I. A., 230.

(7) (1888) L. R., 15 I. A., 171.

(8) (1896) I. L. R., 26 Calc., 39.

to be allowed. "Date of realization" in the judgment of the Privy Council must mean the "date fixed for realization" as put in the head note to the ruling as reported in the Indian Law Reports. In saying that, "if the High Court has allowed something less the mortgagee makes no complaint" their Lordships evidently referred to "rate of interest" in the previous sentence, and not to the period for which it was to be allowed, which was not in question in the case. The rate of interest was 12 per cent. compound interest and not simple interest as awarded by the High Court. It was to this that the Privy Council alluded and to nothing else. It is thus that the Privy Council ruling has been interpreted by the Judicial Commissioner of Oudh in a very recent case—*Allahabad Bank v. Syed Mohamad Jawad* (1). The terms of sections 86, 88 and 89 of the Act clearly support this view. Form No. 128 in Schedule IV of the Code of Civil Procedure makes no mention of any interest after the date fixed for payment. Compare the form for an order for sale in Seton on Decrees and Orders, Vol. III, page 1587. As far as a decree for foreclosure or sale under the Transfer of Property Act is concerned, the Court can calculate interest on the mortgage debt as such only up to the date fixed for payment. It was so held even by the Calcutta High Court in *Surya Narain Singh v. Jogendra Narain Roy Chowdhury* (2). The recent ruling in *Achalabala Bose v. Surendra Nath Dey* (3) apparently overlooks the old practice of the Calcutta High Court. The interest at 4 or 6 per cent. which is generally allowed by the Calcutta High Court after the date fixed for payment is not under the provisions of the Transfer of Property Act. Section 209, Civil Procedure Code, has nothing to do with the matter as it cannot apply to a mortgage decree. The ruling of *Amolak Ram v. Lachmi Narain* does not stand alone in this court. The same view was held in *Tarachand v. Dina Nath* (4).

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(1) (1899) Oudh Cases, 1899, p. 37.

(3) (1897) I. L. R., 24 Calc., 766.

(2) (1892) I. L. R., 20 Calc., 360.

(4) Weekly Notes, 1895, p. 76.

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STRACHEY, C.J.—This was an application for execution of a decree for sale of mortgaged property under section 88 of the Transfer of Property Act, 1882. The question is whether the Court below was right in allowing the decree-holder's claim for interest up to the date of the application and disallowing the judgment-debtor's objections that interest was payable under the decree only up to the 31st December 1892. The decree was passed on the 30th June 1892. It recites the relief claimed in the plaint that the defendants may be ordered to pay to the plaintiff Rs. 13,771-8, principal and interest, together with interest accruing during the pendency of the suit and future interest on the date to be named by the Court, and that, in case of default, the mortgaged property might be sold in satisfaction of the debt, with relief against the person and other property of the defendants. The operative part of the decree is as follows:—

“It is decreed and hereby declared that on the 31st December 1892, the sum of Rs. 14,848-6 will be payable to the plaintiff, *viz.* Rs. 13,817-6 for principal and interest on the mortgage, dated the 21st day of March 1883, *i.e.* Rs. 13,771-8, the amount claimed and Rs. 45-14 *pendente lite* interest, and Rs. 1,031 for his costs of this suit, and it is hereby ordered that upon the defendants paying to the plaintiff or into Court on the 31st December, 1892, aforesaid the said sum with interest at annas 8 per cent. per mensem, the plaintiff shall deliver up to the defendants, or to such person as they appoint, all documents in his possession or power relating to the property specified below, and shall transfer the property to the defendants free from all incumbrances created by the plaintiff, or any person claiming under him, or by those under whom he claimed and shall put the defendants in possession of the property. But if such payment be not made as aforesaid on or before the aforesaid 31st day of December, 1892, then it is ordered that the said 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 the sum

found due to the plaintiff, and that the balance, if any, be paid to the defendants or other persons entitled to receive the same. And it is further ordered that each of the mortgagors, Ahmad Sajjad and Bakar Sajjad, can redeem 5 biswas of mauza Babapur Patti on payment of the amount decreed in equal shares."

The judgment-debtors not having paid the amount decreed, an order absolute for sale of the mortgaged property under section 89 of the Transfer of Property Act was passed on the 29th June, 1893, after notice to them. They did not appear on the date fixed by the notice, and the order absolute for sale was therefore passed *ex parte*. The material part of the order was as follows:—
"It is decreed and ordered that the property detailed below be sold on a date to be fixed hereafter and the sale proceeds, after defraying the expenses of sale, be paid into Court and applied in paying Rs. 16,046, with usual future interest, which has been found to be due to Raja Udit Narain Singh, decree-holder." This Rs. 16,046 included interest calculated up to the 20th June, 1893. As the property to be sold was ancestral property, the Court proceeded to order, in accordance with the rules prescribed by the Local Government under section 320 of the Code of Civil Procedure, that the record should be transmitted to the Collector for execution of the decree. It does not appear whether any proceedings in execution were taken by the Collector before the 20th September, 1894. On that date the property was proclaimed for sale, the amount due under the decree being notified in the proclamation as Rs. 16,046, that is, the amount stated in the order absolute. No sale, however, took place. The sale was first adjourned by the Collector upon an application by the judgment-debtors, who represented that they were making arrangements with the decree-holder for a private disposal of the property. After this it was adjourned several times pending an application made by one of the judgment-debtors, the present appellant, to the Court of the Subordinate Judge, on the 10th December, 1894, dismissed by that Court in September, 1895 and finally dismissed by the High Court in appeal on 8th December,

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1896. In that application, the object of which was to have satisfaction of the decree recorded by reason of an alleged compromise, the appellant stated the "amount due by the judgment-debtor" to be Rs. 8,642, which is half the Rs. 16,046 mentioned in the order absolute and interest thereon at 6 per cent. from the date of that order. On the 11th January, 1896, the decree-holder applied for execution of the decree, claiming interest up to the date of the application, but as the judgment-debtor's appeal to the High Court from the order dismissing his application of the 10th December, 1894, was then pending, the application for execution was not proceeded with. On the 1st November, 1897, the present application for execution was made. In it the decree-holder claimed interest up to the 30th October. Notice was issued under section 248 of the Code to the judgment-debtor, who then for the first time objected that the decree-holder was not entitled to interest beyond the 31st December, 1892, the date fixed by the decree for payment. The Court below disallowed the objection, and ordered execution to issue for the full amount claimed. In this appeal by the judgment-debtor we have to decide whether the lower Court's order was right.

It is clear from the order absolute, the Collector's proclamation, and the appellant's application of the 10th December, 1894, that until the appellant raised his objection to the present application, both the Court and the parties thought that the decree-holder was entitled to interest after the 31st December, 1892. In the argument before us there has been much discussion of the questions whether, and in what sense, the Court, when passing the order absolute, was competent to construe the decree of the 30th June, 1892, or to add to its provisions as to interest; whether, having regard to the terms of the notice to the judgment-debtors upon which that order was passed, the order had the effect of making the question of interest until realization *res judicata* and whether the appellant is estopped from raising his present contention by anything else which occurred in the execution proceedings. In the view which we take of the case, it is not necessary to

decide any of these questions. The only question which we need consider is up to what date the decree upon its true construction awards interest. Now the decree begins by reciting the claim in the plaint for interest after decree as well as interest before suit and interest *pendente lite*, and then fixes the 31st December, 1892, as the date for payment of (i) Rs. 14,848-6 made up of (a) the principal sum and interest claimed in the plaint as due up to the date of suit (b) interest from the date of suit to the date of the decree, (c) costs, and (ii) future interest on the Rs. 14,848-6 at annas 8 per mensem. Then it directs, in accordance with section 89 of the Transfer of Property Act, 1882, that if payment is not made on or before the 31st December 1892, the property or a sufficient part of it is to be sold and that the proceeds after defraying the expenses of sale are to be paid into Court and applied in payment of the sum found due to the plaintiff. Thus the decree clearly makes future interest payable, and the only question is until when? It does not expressly state when the interest thus set running is to stop. The only possible dates at which the Court passing the decree can have intended it to stop are the 31st December, 1892, the date fixed for payment, and the date of actual payment or realization. To which of these dates does the decree awarding interest impliedly refer? Upon principle, and apart from authority, statutory or otherwise, it is difficult to see why the mortgagee should not have interest on his money so long as the debt remains unpaid. The 31st December, 1892, is only named in the decree as the date on which payment is to be made, and after which, if payment is not made, the property is to be sold. It is not named with any special reference to interest. However, in the absence of any express direction as to the date to which interest is payable, the decree is certainly not free from ambiguity on the point.

In *Amolak Ram v. Lachmi Narain* (1), *Pirbhu Narain Singh v. Rup Singh* (2) and *The Maharaja of Bharatpur v. Rani*

(1) (1896) I. L. R., 19 All., 174.

(2) (1898) I. L. R., 20 All., 397.

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Kanno Dei (1) this Court has laid down the principle that a Court executing a decree, the terms of which are ambiguous, should, where it is possible, put such a construction upon the decree as would make it in accordance with law. The principle is, I think, undoubtedly sound: the only question is as to its application. The decree of the 30th June 1892 is, as just shown, capable of two different constructions. Which of the two would make the decree in accordance with law. The construction that it awards interest only up to the date fixed for payment or the construction that it awards interest up to realization? The question depends upon the interpretation of sections 86, 88 and 89 of the Transfer of Property Act, 1882, read with section 90, 94 and 97 of the same Act, and with section 209 and forms 109 and 128 of the fourth schedule of the Civil Procedure Code. Upon this point there is a conflict of authority. On the one hand it was held by this Court in *Amolak Ram v. Lachmi Narain* (2), *Nain Dat v. Harihar Dat Singh* (3) and *The Maharaja of Bhartpur v. Rani Kanno Dei* (1), that in a decree for sale of mortgaged property the Court has no power, under section 88 read with section 86 of the Transfer of Property Act, 1882, to allow interest beyond the date fixed by the decree for payment of the mortgaged money. On the other hand, the Calcutta High Court in *Achalabala Bose v. Surendra Nath Dey* (4), and the Madras High Court in *Subbaraya Ravuthaminda Nainar v. Ponnusami Nadar* (5), have dissented from the decision in *Amolak Ram's* case, and held that the Court has power in a decree under section 88 to award interest subsequent to the decree and the date fixed by the decree for payment, until realization. It is not necessary for us to examine these decisions or to consider which of them we should have followed in the absence of superior authority. Since the latest of them was given, the question has been considered by the Judicial Committee of the Privy Council in *Rameswar Koer v. Mahomed Mehdi Hossein Khan* (6), in

(1) Weekly Notes, 1898, p. 164.

(2) (1896) I. L. R., 19 All., 174.

(3) (1897) Weekly Notes, 1898, p. 57.

(4) (1897) I. L. R., 24 Calc., 766.

(5) (1897) I. L. R., 21 Mad., 364.

(6) (1898) I. L. R., 26 Calc., 89.

a judgment which appears to us to settle it in the sense of the Calcutta and Madras rulings. There the Subordinate Judge passed a decree for sale of mortgaged property awarding interest at the mortgage rate of 12 per cent. down to the date of the institution of the suit, and thereafter at 4 per cent. until realization, with directions for sale in case of non-payment in six months. On an appeal by the defendants to the High Court, the plaintiff mortgagee filed objections to the decree under section 561 of the Code, one of which was that "the Subordinate Judge is wrong in making up the accounts in directing that the amount due should, from date of suit to date of payment, bear only 4 per cent. interest instead of the rate of interest stipulated for in the bond." The decree of the High Court as regards this point is incompletely stated at page 41 of the report. We have been favoured by the Registrar of the Calcutta High Court with a copy of the printed book of appeal to the Privy Council, from page 105 of which it appears that the decree was as follows:—"It is ordered and decreed that the decree of the lower Court, so far as it directs that the amount due should, from the 7th August, 1891, to 15th March, 1893, being the date of payment fixed by the lower Court, bear interest at 4 per cent., be set aside, and in lieu thereof, this Court doth direct that interest do run on the amount due at 12 per cent. from the 7th August, 1891, up to the 15th March, 1893, the date fixed by the lower Court for the payment of principal and interest, and thereafter at the rate of 4 per cent. until realization, and it is further ordered and decreed that, save and except as aforesaid the said decree be and it hereby is dismissed, and it is further ordered and decreed that the appellant do pay to the respondent Rs. 1,454-6-0 (as per details at foot) being the amount of costs incurred by them in this Court, with interest thereon at the rate of 6 per cent. per annum from this date to the date of realization." That is to say the High Court, while agreeing with the Subordinate Judge in awarding interest until realization, thought that the mortgage rate of 12 per cent. should be paid not only to the date of the institution of the suit, but to the date

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fixed by the decree for payment, and that only from that date onwards until realization should the rate be reduced to 4 per cent. From the decision of the High Court the defendants appealed to the Privy Council, one of the grounds of appeal being that the High Court "was wrong in allowing interest at 12 per cent. per annum (the stipulated rate from the date of the suit till the date fixed for payment by the Subordinate Judge." No objection was taken that the Courts should not have allowed interest beyond the date fixed for payment. In the argument as reported it was apparently common ground that, whether the case was governed by the Transfer of Property Act, 1882, or not, interest until realization was properly awarded, and no question appears to have been raised as to the rate of interest awarded from date fixed for payment until realization. The only questions regarding interest were whether the Act applied, and whether the rate of interest from the date of the suit to the date fixed for payment should be the stipulated rate or something less. The judgment of the Privy Council, after stating the effect of the Subordinate Judge's decree, goes on to say, "the High Court varied the decree by ordering 12 per cent. interest instead of 4, and with that exception affirmed it." The terms of the High Court's decree above quoted show that it would have been exactly correct to say that the High Court varied the decree by ordering 12 per cent. interest instead of 4 up to the date fixed by the Subordinate Judge for payment instead of up to the date of suit, and with that exception affirmed it. Upon the general question their Lordships say:—"The High Court founded their order on sections 86 and 88 of the Transfer of Property Act, which indicate clearly enough that the ordinary decree in a suit of this kind should direct accounts allowing the rate of interest provided by the mortgage up to the date of realization. No peculiarity has been shown to exist in this case for cutting down the mortgage rate of interest. If the High Court has allowed something less, the mortgagee makes no complaint. The mortgagor cannot complain if he is made to pay no more than he contracted to pay." The appeal was accordingly

dismissed. The words "if the High Court has allowed something less," that is, less than the mortgage rate of 12 per cent. can only refer to the period from the date fixed for payment until realization. It is thus obvious that the question whether a decree under section 88 read with section 86 of the Transfer of Property Act should allow interest beyond the date fixed for payment and until realization was considered by the Privy Council and answered in the affirmative.

While therefore we must, in accordance with the principle stated in *Amolak Ram v. Lachmi Narain* (1) and the later decisions of the Court, construe the decree of the 30th June, 1892, so as to make it in conformity with sections 86 and 88 of the Transfer of Property Act, we cannot follow those decisions in their application of the principle. To be in conformity with those sections as interpreted by the Privy Council the decree must be construed as awarding interest, not merely until the 31st December, 1892, but until realization of the mortgage money, and in this view of the decree the Court below was right in disallowing the judgment-debtor's objection and in allowing execution for the full amount claimed by the decree-holder. The appeal must be dismissed with costs.

KNOX, J.—I concur.

BANERJI, J.—I am of the same opinion, and have nothing to add.

AIKMAN, J.—I concur in the judgment of the learned Chief Justice, and have nothing to add.

BLAIR, J.—As one of the Judges who was responsible for the decision in *Amolak Ram v. Lachmi Narain* (1), and as one of the Bench which referred this case with a view to its consideration by a Full Bench, I desire to say that I entirely concur with the view of the Chief Justice that the question is authoritatively decided for us by the ruling of the Judicial Committee of the Privy Council in the case of *Rameswar Koer v. Mahomed Mehdi Hossein Khan* (2). I agree that the appeal must be dismissed with costs.

Appeal dismissed.

(1) (1896) I. L. R., 19 All., 174.

(2) (1898) I. L. R., 26 Calc., 39.