

support of this contention the case of *Diwali v. Apaji Ganesb* (1) was relied on.

We agree with the District Judge in thinking that the decision in that case turned on the very special nature of the limited usufructuary interest there in question. We do not understand the Court as in any way departing from the general rule recognized or acted upon in the cases of *Vyankatraya v. Shivrambhat* (2) and *Tamaya v. Timapa Ganpaya* (3) by the same high authority which decided the case of *Diwali v. Apaji Ganesb* (1). We think, in the present case, the general rule must apply, that the sale passed a good title, and that the appeal must be dismissed with costs.

A. F. M. A. R.

Appeal dismissed.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Macpherson, and Mr. Justice Beverley.

RAFIKUNNESSA BIBI AND ANOTHER (DECREE-HOLDERS) *v.* TARINI CHURN SARKAR (JUDGMENT-DEBTOR).*

1891

August 9.

Decree—Construction of decree—Consent decree—Decree in foreclosure suit—Redemption, extension of time for—Appeal, consent decree on—Interest—Transfer of Property Act (IV of 1882), ss. 86, 87.

The plaintiffs obtained a decree for foreclosure. On appeal the lower Appellate Court made a decree in terms of section 86 of the Transfer of Property Act, ordering the defendant to pay the amount due with interest and costs calculated up to the 28th February 1890, or in default to be foreclosed his right to redeem. Upon second appeal on the 30th January 1891 it was "ordered and decreed, with consent of the parties, that the defendant be allowed one month's time to redeem," and in other respects the appeal was dismissed. On the 28th February 1891 the defendant deposited in Court a sum calculated so as to include interest up to that date, but subsequently objected to pay interest after the 28th February 1890.

Held by PETHERAM, C.J., and BEVERLEY, J., (MACPHERSON, J., dissenting) that the effect of the consent decree was to extend the time for redemption to the 28th February 1891, and that interest should be allowed to that date.

*Appeal from Order No. 351 of 1891, against the order of J. F. Bradbury, Esq., Judge of Pubna and Bogra, dated the 10th of August 1891, affirming the order of Babu Promótho Nath Banerjee, Subordinate Judge of that district, dated the 23rd of May 1891.

(1) I. L. R., 10 Bom., 342.

(2) I. L. R., 7 Bom., 256.

(3) I. L. R., 7 Bom., 232.

GOLAK
NATH ROY
CHOWDHREY
v.
MATHURA
NATH ROY
CHOWDHREY.

1892

RAFI-
KUNNESSA
BIBI
v.
TARINI
CHURN
SARKAR.

RAFIKUNNESSA BIBI and another obtained a decree against Tarini Churn Sarkar for foreclosure of a mortgage. On appeal the District Judge on the 7th February 1890 made a decree in terms of section 86 of the Transfer of Property Act, ordering the defendant on or before the 28th February 1890 to pay to the plaintiffs the sum of Rs. 3,000 with interest at 12 per cent. from the 25th May 1887 to the 28th February 1890, and the costs of the lower Court and interest thereon at 6 per cent. from the date of the lower Court's decree to the 28th February 1890, the costs of the appeal and interest thereon from the 7th February to the 28th February 1890, in all a sum of Rs. 4,642-5, and in default the defendant to be debarred of his right to redeem.

The defendant appealed to the High Court. On the 30th January 1891 a consent decree was made in the following terms:—

“It is ordered and decreed with the consent of the parties that the defendant be allowed one month's time to redeem, and it is further ordered and decreed that in other respects the appeal be and the same is hereby dismissed.”

On the 24th April 1891 the decree-holders presented a petition to the Subordinate Judge, stating that the judgment-debtor had on the 28th February 1891 deposited the sum of Rs. 5,200 as due under the decree, but that the payment of this sum had been refused by the Court Officer, on the ground that interest should not be allowed upon the principal sum due to the decree-holders from the 28th February 1890 to the 28th February 1891. The Subordinate Judge took this view of the case, observing:—“There is admittedly no order in the High Court's decree for payment of interest on the principal sum. The decree-holders now want interest on the principal up to the date of deposit, but without an express order to that effect from the High Court I cannot allow interest further than what the District Judge has allowed by his decree.”

The District Judge upon appeal observed:—“Neither my judgment nor my decree gave the plaintiffs interest on the principal or costs after the 28th February 1890, and I never meant to award further interest. The respondent moved me to extend the time for redemption, but I refused to do so. So far as in me lay

I enforced the decision in the appellant's favour. The respondent then appealed to the High Court. The plaintiffs were awarded their costs of the appeal to the High Court with interest, but the High Court gave them no interest on the Rs. 3,000 or the costs of the Subordinate Judge's Court, or my own for the period subsequent to the 28th February 1890." The appeal was accordingly dismissed.

1892

RAFI-
KUNNESSA
BIBI
v.
TARINI
CHURN
SARKAR.

From this decision the plaintiffs, decree-holders, appealed to the High Court.

Upon the hearing of the appeal the Judges of the Division Bench (MACPHERSON and BEVERLEY, JJ.) differing in opinion, the matter was referred for the decision of a third Judge.

Baboo *Nilmadhub Bose* and Baboo *Tara Kishore Chowdhry* appeared for the appellants.

Dr. *Troylukho Nath Mitter* appeared for the respondent.

The opinions of the Court were as follows:—

MACPHERSON, J.—In this case the appellants obtained a decree for the foreclosure of a mortgage. The respondent appealed, and on the 7th February 1890 the District Judge made a decree in the following terms:—"That this appeal be dismissed with costs; that the defendant *Tarini Churn Sarkar* do on or before the 28th February 1890 pay the plaintiffs the Rs. 3,000 expended by them with interest at 12 per cent. from the 25th May 1887 to the 28th February 1890, aggregating Rs. 997, the lower Court's costs Rs. 454-2, and interest thereon at 6 per cent. from the date of the lower Court's decree, viz., the 30th November 1889 to the 28th February 1890, aggregating Rs. 6-12-9, and the costs of this appeal Rs. 183-11, and interest thereon at 6 per cent. from this day to the 28th February 1890, aggregating annas 11-3, in all Rs. 4,642-5, and that in the event of the defendant's default the defendant's interest in the property in suit be extinguished, and the plaintiffs obtain possession thereof."

This decree was in strict conformity with the provisions of section 86 of the Transfer of Property Act.

The respondent then preferred a second appeal to this Court. This appeal was dismissed on the 30th January 1891, the decree

1892

RATI-
KUNNESSA
BIBI
v.
TARINI
CHURN
SARKAR.

being in these terms:—"It is ordered and decreed with the consent of the parties that the defendant be allowed one month's time from this date to redeem, and it is further ordered and decreed that in other respects this appeal be and the same is hereby dismissed."

The question now raised is whether the appellants are entitled to interest on the principal of the mortgage-money and on the costs incurred in the lower Courts from the 28th February 1890 up to the date within the extended time on which payment was made. The lower Courts have held, and I think rightly, that as the decree of this Court does not direct the payment of any additional sum by way of interest, the appellants can only recover the amounts specified in the decree of the District Judge. Section 87 of the Transfer of Property Act empowers the Court making the decree in a suit for foreclosure, upon good cause shown *and upon such terms, if any, as it thinks fit*, to postpone the day appointed for the payment. Reading that section and section 86 together, it seems clear that the amount to be paid to avoid foreclosure is the amount determined under section 86, *plus* the costs incurred and allowed subsequent to the decree, and *plus* also any additional sum which, when an extension is granted, may be made payable.

It is a mistake to suppose that an extension of the time carries with it as of course an extension of the period for which interest is to be paid. If it is intended to impose any additional liability in the way of interest, this must be expressed in terms, otherwise the amount originally fixed is the amount to be paid. Here no terms were imposed, and the effect of the consent order was simply to extend the time for payment.

The consent order is complete in itself and is quite intelligible as it stands. We are asked to so construe it as to impose upon one of the parties a liability which does not necessarily flow from it. This we should not be justified in doing. If the consent order does not express all that it was intended to express, the proper course was to get it put right by the Court which made it. We cannot speculate as to the intention of the parties.

The circumstance that the respondent at first paid in the extra interest cannot, I think, affect our decision.

I would dismiss the appeal with costs.

As Mr. Justice Beverley takes a different view, the case must go before a third Judge. It will be laid before the Chief Justice for orders.

BEVERLEY, J.—In this case the appellants obtained a decree for foreclosure of a mortgage, and on the 7th February 1890 the District Judge made a decree *nisi*, directing that on or before the 28th of that month the defendant should pay to the plaintiffs the principal sum of Rs. 3,000 with 12 per cent. interest from 25th May 1887, and the costs of his Court and of the Court below with interest thereon at 6 per cent. from the dates of the respective decrees, *the interest in both cases to be calculated to the end of the month*, and that in default of such payment there should be a decree absolute for foreclosure.

Against this decree the defendant preferred a second appeal, and on the 30th January 1891 a Division Bench of this Court disposed of the appeal in these terms:—"It is ordered and decreed with the consent of the parties that the defendants be allowed one month's time from this date to redeem, and it is further ordered and decreed that in other respects this appeal be and the same is hereby dismissed."

On or before the 28th February 1891 the defendant paid into Court the full amount, calculating the interest as due up to that date, but on the plaintiffs' applying for the money an objection was raised—apparently in the first instance by some person in the office of the Subordinate Judge—that under the terms of this Court's decree the defendant was only bound to pay interest up to the 28th February 1890.

Both the lower Courts have taken this view, holding that inasmuch as the appeal was dismissed by this Court, except that by consent a fresh date was fixed for payment, the amount to be paid must be held to be that named in the decree of the District Judge of the 7th February 1890.

The question before us, then, is whether under the terms of this Court's decree the plaintiffs are entitled to interest from 1st March 1890 to 28th February 1891.

It appears to me that had this Court intended that no interest should be payable after the 28th February 1890, the decree would

1892

RAJ-
KUNNESSA
BIBI
v.
TARINI
CHURN
SARKAR.

1892
 RAJI-
 KUNNESSA
 BIBI
 v.
 TARINI
 CHURN
 SARKAR.

have stated explicitly that the defendant be allowed one month's time from this date to pay up the amount mentioned in the decree of the lower Court. The words of the decree, however, are "one month's time from this date to redeem," and that must mean to redeem in accordance with the provisions of sections 86 and 87 of the Transfer of Property Act. Under section 87 the Court may from time to time postpone the date fixed for payment, but by section 86 the interest would be calculated up to the substituted date, and similarly in this case I take it that the effect of this Court's decree was merely to substitute the 28th February 1891 for the 28th February 1890, in the decree of the District Judge, and the natural result of that would be that interest would be calculated up to the later date. This view of the case seems to be in accord with that taken by the Madras Court in *Manavikraman v. Unniappan* (1).

Further, it is to be observed that the decree of this Court was made by consent of parties, and the intention of the parties may be inferred from the fact that the defendant paid into Court interest up to 28th February 1891. It is obvious, moreover, that the plaintiffs who were then entitled to a decree absolute would scarcely have consented to forego that decree and to allow the defendant further time, unless it was understood that they would receive interest for the period in dispute.

For these reasons I am of opinion that the orders of the lower Courts should be set aside, and the interest on the principal sum and on the costs of Court calculated up to the 28th February 1891. And I think that the appellants are entitled to their costs in this matter in all the Courts.

PETHERAM, C.J.—I agree in the view taken by Mr. Justice Beverley in this case. I think the only question is what is the true construction of the agreement come to between the parties as set out in the consent order of this Court. By the consent order of this Court the appeal of the mortgagor was dismissed, and also by consent the time for redemption was extended from the 28th February 1890 to the 28th February 1891. The meaning of that, in my opinion, including the meaning of the word "redemption," is that

(1) I. L. R., 15 Mad., 170.

the mortgagor would be entitled to redeem his property on payment of what is due at the time of redemption. The amount due at the time of redemption would be the amount of principal and interest calculated down to the time of payment, and the time of payment having been extended down to the 28th February 1891, in my opinion under the terms of the agreement the mortgagee would be entitled to calculate his interest down to that time. That was the view of the parties, because the defendant did calculate his interest down to that time and did pay the whole amount, including that interest, into Court to be paid over to the plaintiffs, although he afterwards for some reason or other gave notice to the Court not to pay over the interest for the year, and it is contended before me now that he had a right to do that, because the decree of this Court when it was drawn up did not assess the extra year's interest. If this were a question of execution, there might be ground for contending that before the decree could be executed it must be amended by making a calculation and inserting the figure in the decree, but inasmuch as the defendant himself accepted that, and calculated the amount on that basis and paid it into Court for the plaintiffs, it seems to me there is no necessity now for making any further calculation of interest. The interests of justice in this case will be fully served by directing the Court to pay this amount, which was paid by the defendant for the plaintiffs, to the plaintiffs. The result is that the order will be in accordance with that proposed by Mr. Justice Beverley, and the mortgagee must get the costs.

A. A. C.

*Appeal decreed.**Before Mr. Justice Norris and Mr. Justice Beverley.*

HRIDOY NATH SHAHA AND ANOTHER (DEFENDANTS) v. MOHOBUTNESSA BIBEE AND OTHERS (PLAINTIFFS) AND OTHERS (DEFENDANTS).*

1892

August 17.

Partition—Private partition—Putni of separate share—Subsequent partition under Bengal Act VIII of 1876, section 128—Parties—Defendants.

The plaintiffs were co-sharers in a certain estate, T being another co-sharer. In 1818 a private partition took place between the co-sharers in

* Appeal from Appellate Decree No. 1465 of 1891, against the decree of F. J. Bradbury, Esq., District Judge of Pubna and Bogra, dated the 26th day of June 1891, affirming the decree of Baboo Prosunno Comar Bose, Munsiff of Pubna, dated the 7th April 1890.

1892
RAFI-
KUNNESSA
BIBI
v.
TARINI
CHURN
SARKAR.