

(1927) 07 CAL CK 0046
In the Calcutta High Court

Madhu Sudan Kundu and Others

APPELLANT

Vs

Chhalimaddin Ahammad and Others

RESPONDENT

Date of Decision : 21-07-1927

Acts Referred:

Citation : AIR 1928 Cal 167

Hon'ble Judges : Roy, J;B.B. Ghose, J

Bench : Full Bench

Judgement

B.B. Ghose, J.—A preliminary objection has been taken on behalf of the plaintiffs-respondents that this appeal is incompetent. The appeal is against the preliminary decree passed on a mortgage, dated the 24th January 1924. The final decree was made on 28th February 1924. The appeal against the preliminary decree was filed on 27th May 1924. It is, therefore, contended that having regard to some of the cases decided in this Court, this appeal is incompetent. Personally I am of opinion that the cases which have been decided after the passing of the CPC of 1908 have not laid down the correct rule. Under this Code, a preliminary decree has an independent existence and by the appeal against the final decree one cannot attack the preliminary decree. The case was different under the old Code. What is now a preliminary decree was supposed to be a preliminary order and the final decree was held to absorb that order and by an appeal against the final decree that order might have been challenged. It was, therefore, held under the old Code that after the passing of the final decree in the case, the preliminary order had no separate existence, and, therefore, the appeal against that order was incompetent after the passing of the final decree. That reasoning, however, does not apply when the law is that you cannot challenge a preliminary decree by an appeal against the final decree. A preliminary decree is now an independent decree which is not absorbed by the final decree. The final decree is really dependent upon the preliminary decree, and if there is no appeal from the final decree, but the preliminary decree is set aside on appeal, the final decree will necessarily fall to the ground. The mischief of the procedure suggested by the learned advocate for the respondents is this :

There may be a very good ground for appeal against the preliminary decree, but there may be absolutely no ground for appeal as against the final decree which merely works out the directions made in the preliminary decree. To compel a party to appeal against the final decree against which there is no ground whatsoever to urge in order that his appeal against the preliminary decree may be heard seems to me to amount to a farce. Mr. Sen very rightly recognizes that position, but he relies upon the decided cases of this Court. I may say that the other High Courts have not followed this practice. I would have thought it necessary to have this question referred to a Full Bench for final decision if the appellants had not taken steps which they have taken in this case and which do not compel me to make such reference. The steps that they have taken are that they have made an application after the filing of their appeal to be allowed to amend their memorandum of appeal so as to make it also an appeal against the final decree. This procedure was suggested by the case of *Kulada Prosad Chowdhury v. Ramanand Patnaik* AIR 1921 Cal. 109. We grant the application made on behalf of the appellants. Let the memorandum of appeal be so amended that it would be an appeal both as against the final decree as well as against the preliminary decree. Now we propose to deal with the merits.

2. The only point urged before us in the appeal was a question of limitation. Defendants 5 to 10 and 25 were alleged to have obtained the interest in the mortgaged property under a paramount title, that is to say, they had purchased in execution of a mortgage prior to that of the plaintiffs. But in the previous suit brought by the prior mortgagor the present mortgagees who were puisne mortgagees, were not made parties. Thereupon the right of the plaintiffs as puisne mortgagees to redeem the prior mortgage was left intact. Although defendant 25 was impleaded in the suit long after the plaintiff's suit as against the mortgagors was barred by limitation, still the plaintiff's right to redeem defendant 25 was not barred. Therefore, the question of limitation as between the plaintiffs and the appealing defendants does not arise.

3. There is, however, a very small point with regard to the amount of money which the appealing defendants were held by the Court below to be entitled to on a sale of the mortgaged property. There is no objection by either party as to the form of the decree. The Court below has ordered the sale of all the properties mortgaged to the plaintiff and has allowed the appealing defendants a first charge on the purchase money for the amount of their mortgage debt under the previous mortgage bond. In working out that sum the appellants have been allowed somewhat less than what they might have been entitled to. The Subordinate Judge has only given them a decree for the amount which was sued for in the plaint. But under the decree in their mortgage suit the defendants, were allowed interest at the bond rate of Rs. 1-8-0 till the date of redemption-which was fixed for the 24th August 1913. The appellants are, therefore, entitled to the interest up to that date on the amount sued for plus the costs and after that its interest on the whole at 6 per cent, per annum till the date of sale which was the 24th May 1915. This sum has been worked out by the learned vakils for both

the parties agreeing to the figure as Rs 2,4000. The decree of the Subordinate Judge must, therefore, be varied to this extent : that defendants 5 to 10 and 25 will get Rs. 2,400 out of the money realized by sale of the mortgaged properties prior to the plaintiffs in this case getting anything out of it.

4. With this modification this appeal is dismissed. There will be no order as to costs in this appeal

5. This, however, will not preclude the appealing defendants or any other defendants from redeeming the plaintiffs mortgage as directed by the decree of the Subordinate Judge, dated the 24th January 1924

Roy, J.

6. I agree.