

(1922) 03 CAL CK 0004
In the Calcutta High Court

Srimati Nagendrabala Dassi and Others	APPELLANT
Vs	
Dinanath Mahish and Others	RESPONDENT

Date of Decision : 27-03-1922

Acts Referred:

Citation : AIR 1923 Cal 215 : 70 Ind. Cas. 933

Hon'ble Judges : Lancelot Sanderson, C.J; Thomas Richardson, J

Bench : Division Bench

Judgement

Lancelot Sanderson, C.J.—This is an application for leave to appeal to His Majesty in Council, by Srimati Nagendrabala Dassi and Nobo Kumar Hazra against the judgment of this Court dated the 20th May 1921 See Dinanath Mahish v. Nabakumar Hajra 70 Ind. Cas. 542--[Ed] and the first question which we have to decide is whether the decree of the High Court is one which affirmed the decree of the Court immediately below.

2. The position is somewhat curious, because the plaintiffs were the appellants, although the petitioners now before us had put in cross-objections, and the plaintiffs' appeal was dismissed with costs, yet the decree of the learned Subordinate Judge was affirmed with one variation, namely: "that the decree as also the mortgaged properties purchased by the assignee in execution will be included in the conveyance and the plaintiffs will be allowed two months from the date of the decree of this Court to deposit the amount mentioned in the judgment of the Subordinate Judge." The decree made by the First Court was to this effect, that the suit be decreed and that the defendants Nos. 1 and 2 do assign the decree in favour of the plaintiffs on the latter depositing Rs. 13,750 and so on. As already pointed out, this Court varied that decree by directing that the plaintiffs were entitled not only to an assignment of the decree but also to a conveyance of the mortgaged property purchased by them in execution. The learned Judges of this Court stated in an earlier part of their judgment as follows: "It was apparently overlooked that, during the pendency of the suit, the decree had already been executed and the hypothecated properties purchased by

the assignee of the decree." With every respect to the learned Judges, it appears to me that this was not quite a correct statement of the position as regards the Court of first instance, because on reading the judgment of the learned Subordinate Judge it seems to me that the learned Subordinate Judge had not overlooked but had drawn attention to the above-mentioned fact, and had come to the conclusion that, having regard to the way in which the suit was framed, it was not open to him ,to declare that the plaintiffs were entitled to the conveyance of the property purchased by the assignee; of the decree. The passage in the judgment is at page 136 of the paper-book and is as follows: "The plaintiffs have not added any prayer for conveyance of their mortgaged properties to them. Still, however, money is due on the decree in question and the plaintiffs may on that account as well pray for an assignment of the decree in their favour. What the effect of such a decree will be on the lands thus sold in execution of the mortgage-decree in question is a different question with which the Court has nothing to do in the present suit as framed." I lead the judgment of the learned Subordinate Judge to mean that in the suit, as framed, it was not open to him to direct a conveyance to the plaintiffs of the mortgaged properties. If that be so, then it seems to me that the judgment of the High Court was one which overruled that decision, because the learned Judges came to the conclusion that in that suit as framed, it was open to the learned Subordinate Judge to direct a conveyance of the mortgaged property to the plaintiffs and inasmuch as they directed by their judgment that the mortgaged properties should be included in the conveyance. Under these circumstances, it seems to me that it is impossible for us to hold that decree of the High Court affirmed the decision of the Court below.

3. The result is, that it is not necessary for the petitioner to show that any substantial question of law is involved, and the only other question which we have to consider is the question of value. Upon the appeal to the Judicial Committee of the Privy Council the petitioners have a right to appeal against the whole decree of this Court and it cannot be disputed that the subject-matter of the suit as well as the subject-matter of the appeal is of the value of more than rupees ten thousand. Consequently, in my judgment, a certificate should be granted.

Richardson, J.

4. I agree.