

1913  
 NAFAR  
 SHEIKH  
 v.  
 EMPEROR.

the accused ought not in this case to have been committed on a charge of the completed offence and not on a charge of attempt only. I express no opinion on this point for it was not argued before us.

E. H. M.

*Re-trial ordered.*

---

APPELLATE CIVIL.

---

*Before Richardson and Newbould JJ.*

TARA PRASANNA BOSE

v.

NILMONI KHAN.\*

1913  
 July 29.

*Appeal—Mortgage decree—Representatives of Judgment-debtor—Transfer of Property Act (IV of 1882) ss. 52, 56, 81—Civil Procedure Code (Act V of 1908) ss. 2, 47, 151, and O. XXXIV, r. 5—Foreclosure—Sale—Exclusion of property.*

Where the petitioners, subsequent mortgagees, (who had foreclosed a property which, it now transpired, was included in an earlier mortgage of several other properties to the present decree-holders, prior mortgagees,) applied under s. 47 of the Code of Civil Procedure for the exclusion of the property from the present sale proceedings and got this order, and the judgment-debtor (mortgagor) appealed therefrom :—

*Held*, that the petitioners were the representatives of the judgment-debtor within the meaning of s. 47 of the Code of Civil Procedure and that this order could not be regarded merely as an order under rule 5 of Order XXXIV of the Code of Civil Procedure but amounted to a decree within the meaning of s. 2 of the Code and was therefore appealable.

*Held*, further, that the Courts have power, in appropriate circumstances to make such orders under ss. 56 and 81 of the Transfer of Property Act.

*Ishan Chandra Sirkar v. Beni Madhub Sirkar* (1) relied on.

*Kommineri Appayya v. Mangala Rangayya* (2) distinguished.

\* Appeal from Order, No. 343 of 1912, against the order of Advaita Prasad De, Subordinate Judge of Manbhum, dated March 15, 1912.

(1) (1896) I.L.R., 24 Cal. 62.

(2) (1908) I.L.R., 31 Mad. 419.

APPEAL by Tara Prasanna Bose, the judgment-debtor.

1913

TARA  
PRASANNA  
BOSE  
v.  
NILMONI  
KHAN

Thirteen properties were mortgaged by the judgment-debtor (the appellant) to the decree-holder (Respondent No. 1) by an instrument dated 29th June 1905. A suit was brought on 4th December 1908 and on 22nd April 1909 a decree was made therein for sale of the mortgaged properties. Meanwhile on the 24th June 1909 the appellant had mortgaged one of these very thirteen properties (viz. No. 11 being Mouza Sankra *alias* Niyamatpur) by way of conditional sale to the other respondents who brought a suit upon their mortgage and under the decree which they obtained on 8th June 1911, they foreclosed the mortgage and entered into possession of property No. 11. When the prior mortgagee who had not made the subsequent mortgagees parties to his suit obtained in the execution department an order for the sale of the properties mortgaged to him, the subsequent mortgagees filed a petition under sec. 47 of the Code of Civil Procedure and applied that the properties other than No. 11 should be sold first and that No. 11 should be sold last as the sale proceeds of the former was likely to satisfy the decree. This application which was opposed by both decree-holder and judgment-debtor was allowed on 15th March 1912.

*Babu Bankim Chandra Mukherji*, for the appellant. I submit, *first*, that the Court had no jurisdiction to make the order. The applicant was not a party to the suit and his interest will not at all be affected. I rely on *Kommineri Appayya v. Mangala Rangayya* (1). *Secondly*, the Court cannot make the order without coming to a distinct finding that the petitioner had no notice of the prior mortgage in accordance with

(1) (1906) I. L. R. 31 Mad. 419.

1913

TARA  
PRASANNA  
BOSE  
v.  
NILMONI  
KHAN.

s. 81 of the Transfer of Property Act. Moreover, in this case the subsequent mortgage was executed pending the suit on the previous mortgage and therefore the subsequent purchaser must be deemed to have notice of the prior mortgage : s. 52 of the Transfer of Property Act. As to the preliminary objection that no appeal lies, I submit that the question is concluded by the decision of the Full Bench in *Ishan Chunder Sirkar v. Beni Madhub Sirkar* (1) as this is an order under s. 47 of the Code of Civil Procedure.

*Babu Golap Chandra Sarkar (Babu Sarat Chandra Dutt and Babu Rishindra Nath Sarkar with him)*, for the respondents. I have already taken the preliminary objection that no appeal lies as this order is one under s. 151 of the Code of Civil Procedure. This is not an order under s. 47 of the Code of Civil Procedure as the order was not between the parties to the suit. I submit that it cannot come under s. 81 of the Transfer of Property Act because the other mortgagee is not an appellant here. This objection of notice has not been taken in the grounds of appeal. Further, the ground of *lis pendens* under s. 52 of the Transfer of Property Act has not been taken either in the grounds of appeal or in the objection to our petition. Section 56 of the Transfer of Property Act, as was pointed out by your Lordships, is applicable to this case.

*Babu Bankim Chandra Mukherji*, in reply. I submit that the objection is not a merely technical one. The subsequent mortgagor or purchaser, as the case may be, might have paid only for the equity of redemption and it would be inequitable to throw the whole burden of the mortgage debt on the other property. In this case the question relates to the execution of the decree and it arises between the subsequent purchaser and the judgment-debtor. It is only the

judgment-debtor, whose interest it is to see that the property fetches its proper value, who is affected by the order complained of and he can appeal under s. 47 of the Code of Civil Procedure (Act V of 1908).

1913  
 TARA  
 PRASANNA  
 BOSE  
 v.  
 NILMONI  
 KHAN.

*Cur. adv. vult.*

RICHARDSON AND NEWBOULD JJ. Thirteen properties were mortgaged by the judgment-debtor, the appellant before us, to the decree-holder, the first respondent, by an instrument dated the 15th Ashar 1312 (29th June, 1905). The first respondent, Mahananda Chakravartti, brought a suit upon his mortgage on the 4th December, 1908, and on the 22nd April, 1909, a decree was made therein in the usual form for payment of the mortgage debt or in default for the sale of the mortgaged properties. On the 24th June, 1909, the appellant mortgaged one of the thirteen properties (No. 11) by way of conditional sale to the other respondents in this appeal who are described as the petitioners. The latter brought a suit upon their mortgage and under the decree which they obtained, dated the 8th June, 1911, they foreclosed the mortgage and entered into possession of property No. 11. Mahananda Chakravartti having obtained in the execution department an order for the sale of the properties mortgaged to him, the petitioners came in and applied that the properties other than No. 11 should be sold first, and that No. 11 should be sold last. The application was opposed both by Mahananda Chakravartti and the appellant but was allowed by the learned Subordinate Judge by an order dated the 15th March, 1912. Mahananda Chakravartti has not appealed from that order. The appellant is, as we have said, the judgment-debtor, Tara Prasanna Bose. It will be observed that the petitioners' interest arose after Mahananda obtained his decree.

1913

TARA  
PRASANNA  
BOSE  
v.  
NILMONI  
KHAN.

The first question which arises is whether the petitioners were at liberty to come in under section 47 of the Civil Procedure Code and apply as they did. In our opinion, on the authorities, the question must be answered in the affirmative. It is clear that the petitioners are bound by the decree made in the suit brought by Mahananda Chakravartti. They are therefore, as regards property No. 11, the representatives of Tara Prasanna Bose within the meaning of section 47: *Ishan Chandra Sirkar v. Beni Madhub Sirkar* (1). The question involved in the application was substantially a question arising between the petitioners and Mahananda Chakravartti, though it might also involve a separate and distinct question arising between the petitioners and Tara Prasanna Bose. The contention, therefore, urged on behalf of the appellant, that the application as an application under section 47 was incompetent, must be rejected. Then it was said that if the application was competent, the learned Judge had no power to make the order appealed from. The Courts, however, have power in appropriate circumstances, to make such orders, under sections 56 and 81 of the Transfer of Property Act.

In regard first to section 81, no doubt that section only applies where the second mortgagee had no notice of the first mortgage. But no question of notice was raised in the Court below or in the grounds of the appeal preferred to this Court. Till the appeal came to be argued before us, it was never suggested either by Mahananda or by Tara Prasanna that the petitioners had notice of the mortgage to Mahananda. We cannot allow the question to be raised for the first time in appeal.

Apart from that, the petitioners being now in the position of purchasers from Tara Prasanna Bose, the

relevant section is, in our opinion, section 56 and the petitioners have as against Tara Prasanna Bose a positive right to have Mahananda's mortgage satisfied out of the properties other than property No. 11 so far as they will extend.

On the merits it was argued that the petitioners had no right to have property No. 11 exempted from the burden of Mahananda's mortgage, because what they had acquired was merely the right to redeem Mahananda. But to say this is to raise the question of notice under section 81 in another form and even if the case fell to be decided under section 81 and not under section 56, the contention is met by the observation already made that no such suggestion was made in the lower Court. It was not suggested then—and so far as there are any indications on the record, it is not the case—that the petitioners dealt with or acquired property No. 11 otherwise than on the footing that it was an unincumbered property.

The case of *Kommineri v. Mangala* (1) to which reference was made in the argument, is of no assistance to Tara Prasanna. Section 56, as we have said, gives the petitioners a positive right as against him. Mahananda, the first mortgagee, has not appealed and it is not open to Tara Prasanna to take the objection that the order should not have been made in opposition to Mahananda's wishes, an objection which Mahananda himself has not seen fit to press.

A preliminary objection was taken on behalf of the petitioners that the appeal does not lie. It was suggested that the order in question might be supported without reference to the Transfer of Property Act, as an order under clause (2) of rule 5 of Order XXXIV of the Civil Procedure Code, and it was argued that no appeal would lie from such an order. In the view we

1913

TARA  
PRASANNA  
BOSE  
v.  
NILMON  
KHAN.

(1) (1908) I, L. R., 31 Mad. 419.

1913  
TARA  
PRASANNA  
BOSE  
v.  
NILMONI  
KHAN.

have already indicated it is unnecessary for us to express an opinion on the second branch of this contention or to say more than that in the circumstances this order, made at the instance of the petitioners, who were not parties to Mahananda's suit, cannot be regarded merely as an order under rule 5 of Order XXXIV and that holding as we do that the case falls within section 47 of the Code the order amounts to a decree within the meaning of section 2 of the Code and is therefore appealable.

The appeal fails and is dismissed with costs.

G. S.

*Appeal dismissed.*