

1926  
 OFFICIAL  
 ASSIGNEE OF  
 CALCUTTA  
 v.  
 RAM-  
 RATAN DAS  
 BAGRE.  
 RANKIN C. J.

that matter. With regard to this appeal there can be no question that the Official Assignee having lost, must pay the costs of the respondents.

MUKERJI J. I agree.

Attorneys for the appellant: *N. C. Mandal & Co.*

Attorneys for the respondent: *Dutt & Sen.*

N. G.

## APPELLATE CIVIL.

*Before Suhrawardy and Duval JJ.*

GOPAL CHANDRA SAHA

v.

ABDAR RAHIM BISWAS.\*

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 Nov. 11.

*Appeal—Preliminary decree—Final decree—Appeal against the preliminary decree after the passing of the final decree—Maintainability.*

Where in a mortgage suit a preliminary decree passed by the Munsif was appealed against before the District Judge, and then taken on second appeal before the High Court without preferring any appeal against the final decree which in the meanwhile was passed by the Munsif in terms of the judgment of the District Judge ;

*Held*, that the appeal to the High Court from the preliminary decree was incompetent.

*Nanibala Dasi v. Ichamoyee Dasi* (1), *Jugendra Narayan Das v. Satyendra Chandra Ghose* (2), referred to.

SECOND APPEAL by Gopal Chandra Saha, the plaintiff.

\* Appeal from Appellate Decree, No. 981 of 1924, against the decree of M. C. Ghose, District Judge of Jessore, dated March 11, 1924, modifying the decree of Ramesh Chandra Sen Gupta, Munsif of Jhenidah, dated June 14, 1923.

(1) (1923) 40 C. L. J. 291.

(2) (1925) 29 C. W. N. 640

This appeal arose out of a suit for the enforcement of a mortgage bond executed by the principal defendant Abdar Rahim Biswas in favour of one Salim Mandal, on whose death, his heirs, the *pro forma* defendants transferred the said bond to the plaintiff. The defence *inter alia* was that some payments made to the original mortgagee had not been credited towards the debt, the Court of first instance did not believe the payments and passed a preliminary decree for the amount claimed, the defendant No. 1 then appealed and the District Judge set aside the preliminary decree so far as it disallowed the plea of payment, the plaintiff thereupon preferred this second appeal before the High Court on 2nd May 1924, meanwhile the Munsif had passed a final decree on 26th April 1924 in terms of the judgment of the District Judge.

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*Dr. Radhabinode Pal, Babu Bhupendra Kishore Basu, Babu Jatindra Mohan Banerji and Babu Binsorilal Sarkar, for the appellant.*

*M. Syed Nasim Ali, for the respondent No. 1.*

SUHRWARDY, J. A preliminary objection is taken on behalf of respondent No. 1 to the hearing of this appeal. The facts on which it is based are somewhat peculiar. The appellant brought a mortgage suit against respondent No. 1 with a further prayer that in case it was found that any amount was paid to the *pro forma* defendants who are the heirs of the original mortgagees and from whom the plaintiff purchased the mortgage that amount might be decreed as against those defendants. The defence was a plea of payment of a certain amount by the defendant No. 1 to the original mortgagee the predecessors of the other defendants. The Munsif in the first Court did not believe

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the plea of payment and passed a preliminary mortgage decree against the defendant No. 1. On 18th July 1923 that decree was made absolute. The defendant No. 1 preferred an appeal against the preliminary decree to the District Judge who by his order dated the 11th March 1924 set aside the preliminary decree in so far as it disallowed the plea of payment taken by the defendant No. 1. Against that decision of the District Judge this appeal was lodged in this Court on 2nd May 1924.

It appears that on the 26th April 1924 the order of the Appellate Court varying the preliminary decree was forwarded to the Munsif in the first Court who on the 26th April 1924 set aside the previous final decree passed by his predecessor and passed a final decree in terms of the judgment of the lower Appellate Court. No step appears to have been taken by the appellant against the order passing the final decree. On these facts it is urged on behalf of the defendant No. 1 who alone appears before us that the present appeal so far as he is concerned is incompetent inasmuch as the final decree passed by the Munsif on the 26th April 1924 remains unaffected. In my judgment, this contention should prevail. It has been held in several cases which are considered and followed in *Nanibala Dasi v. Ichamoyee Dasi* (1), that an appeal against a preliminary decree after the final decree is passed becomes infructuous. In that case the preliminary decree and the final decree were passed by the same Court. Despite this distinction I do not think that there is any difference in principle. The principle underlying the law as laid down above is that where an appeal is preferred against the preliminary decree after the final decree is passed the latter decree cannot be held to be contingent or dependent on the result of

(1) (1923) 40 C. L. J. 291.

the appeal against the preliminary decree. Hence where no steps are taken to have the final decree set aside the appeal against the preliminary decree must be held to be infructuous. This principle was more fully explained in *Jogendra Narayan Das v. Satyendra Chandra Ghose Mouluk* (1). I am accordingly of opinion that the appeal as against defendant No. 1 must be held to be incompetent and must fail. But the learned vakil appearing for the appellant asks us to treat the decree passed by the Munsif on the 26th April 1924 as nullity because he never asked for a final decree under Order XXXIV, rule 5. We are not prepared to agree with this submission. We are not in possession of all the facts relating to the passing of the decree. The appeal against the defendant No. 1 must therefore be dismissed with costs.

As against the other respondents it is argued that the learned District Judge was wrong in not allowing a decree against them to the plaintiff. In the deed of assignment executed by the mortgagees in favour of the plaintiff it is stipulated that if any sum is subsequently found to have been paid to the assignor over and above the amounts entered on the back of the bond the assignor will return such amounts to the plaintiff. It has now been finally found by the lower Appellate Court that the sum of Rs. 460 was paid by the mortgagor to the mortgagee which was not entered on the bond. The decree which is now passed in favour of the plaintiff is, therefore, reduced by the sum of Rs. 460 under the decree of the lower Appellate Court. In the plaint the plaintiff prayed for an alternative decree against the defendants other than defendant No. 1 claiming the entire amount which he had paid, by way of compensation. He is clearly not entitled to it but he is in equity and justice entitled to

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recover the amount which they took from the mortgagors and did not wrongfully disclose to the plaintiff at the time of the deed of assignment. The learned District Judge did not take this part of the plaintiff's case in consideration as he ought to have done.

In this view, we are of opinion that the decree passed by the lower Appellate Court as regards respondents other than respondent No. 1 should be discharged. A decree should be passed in favour of the plaintiff as against those respondents for the sum of Rs. 460 with proportionate costs. The amount so decreed will in the event of non-realization bear interest at the rate of six per cent. per annum.

DUVAL J. I agree.

A. S. M. A.

*Appeal allowed in part.*