

## Gopal Chandra Saha Vs Abdur Rahim Biswas and Others

**Court:** Calcutta High Court

**Date of Decision:** Nov. 11, 1926

**Citation:** AIR 1927 Cal 492 : 103 Ind. Cas. 538

**Hon'ble Judges:** Suhrawardy, J; Duval, J

**Bench:** Full Bench

### Judgement

Suhrawardy, 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 mortgagees, the predecessors of the other defendants. The Munsif in the first Court did not believe 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.

2. 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 remained unaffected. In my judgment, this contention should prevail. It has been held

in several cases which are considered and followed in Nanibala Dasi and Another Vs. Ichhamoyee Dasi and Others, 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 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 Vs.

Satyendra Chandra Ghosh Moulik, . 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 a nullity

because he never asked for a final decree under Order 34, Rule 5. We are not prepared to agree with thi3 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.

3. 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 mortgagee 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 paid by way of compensation. He is clearly not entitled to it but he is in equity and justice entitled to 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 into consideration as he ought to have done.

4. 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-realisation bear interest at the rate of six per cent per annum.

Duval, J.

5. I agree.