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**(1945) 02 MAD CK 0026**  
**In the Madras High Court**

Boddepalli Sanyasappa Rao and Another APPELLANT  
Vs  
Sanapala Papinaidu and Others RESPONDENT

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**Date of Decision :** 20-02-1945

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 34 Rule 13

**Citation :** AIR 1945 Mad 392 : (1945) 1 MLJ 430

**Hon'ble Judges :** Chandrasekhara Ayyar, J; Chandrasekhara Aiyar, J

**Bench :** Division Bench

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**Judgement**

Chandrasekhara Ayyar, J.—In this appeal preferred by the judgment-debtors 4 and 5, the only question which arises is whether a sum of

Rs. 1,640 which was realised by sale of the first defendant's properties in execution of a charge decree should first be appropriated to interest and

costs due under the"" decrees of the trial Court and the appellate Court, or whether it can be appropriated in the manner the decree-holder has

done in filing the execution application, namely, towards the amount of the principal and interest due under the decree. This question would not

arise at all and would have no value if we had not more than one mortgagor to consider. The right conferred on the mortgagee to appropriate

realisations under the decree first towards interest and then towards costs and lastly towards the principal money is intended for his benefit and the

mortgagor cannot--and generally will not--insist on his taking this benefit. But where there is more than one mortgagor, the difficulty arises as

between them and the method of appropriation will assume importance, especially where the moneys realised are from the properties, comprised

in the mortgage and belonging to one or a few only among them. The decision in Sabapathi Pillai and Others Vs. Chockalinga Pillai, cited for the

appellant, is authority for the position that Order 34, Rule 13 of the Code of Civil Procedure, which lays down the method of appropriation,

applies not merely to a case where a property is sold with the consent of the prior mortgagee but also to other cases where there is no prior

mortgage to consider and provide for. When this difficulty is got over, the rest of the legal position seems to be fairly clear. When moneys are

realised in execution of a mortgage decree, > they should be applied in the manner provided under Order 34, Rule 13, as a general rule, unless

there is something in the decree itself to indicate that a contrary appropriation or application of the sale proceeds was intended or directed. The

Subordinate Judge has held that the contrary has been indicated by the High Court judgment in the present case and he has referred in the course

of his judgment to Clauses 2 and 4 of the High Court's decree where the words "" the aforesaid amount"" are used, meaning the amount specified in

Clause 1, viz., Rs. 6156-6-n. He took the view that, as the High Court stated that the plaintiff should have a charge for that amount on the family

properties in the hands of the first defendant and that the properties of the first defendant should be sold in the first instance in realisation of that

amount, the costs awarded were not to be first taken out of the sale proceeds as they are not included in the ""aforesaid, amount."" This construction

of the decree is far too technical and narrow and I have no doubt whatever that it was not intended by the learned Judges when they spoke of the

charge for the "" aforesaid amount"" and a sale for its realisation, that a different rule from what is enunciated in Order 34, Rule 13 should be

followed. On the other hand, they say in paragraph 7 that, except in the manner provided by them, the decree of the lower Court was confirmed

and the appeal was dismissed. The decree of the lower Court provided for the payment of a certain amount as costs by the first defendant. This

decree was-confirmed. The general rule about costs being taken first out of the sale proceeds must apply. It is true they provide in para 9 of their

own decree for payment of costs not merely by the first defendant but also by some of the other defendants as well. This decree for costs,

imposing liability on the other defendants as well, does not alter the situation in favour of the decree-holder on the question that we are now

considering. It is as if such a decree was made even by the first Court and the position would be that several persons interested in the mortgaged

property including the first defendant were under an obligation to pay the costs to the plaintiff. Sabapathi Pillai and Others Vs. Chockalinga Pillai, is

exactly such a case. There too the first defendant who was the mortgagor was directed to pay a certain sum of money for the plaintiff's costs. The

second defendant was impleaded as a coparcener of the first defendant and the decree stated that he should also be liable for the said costs. The

sale proceeds were found insufficient to discharge the entire mortgage debt and interest and costs and the plaintiff applied for execution against the

second defendant to recover the costs decreed against him. The second defendant contended that, so far as costs were concerned, the sale

proceeds should have been first applied in payment of interest and costs and that the balance alone should be applied to the payment of the

principal amount. His contention that the plaintiff was not, therefore, entitled to any relief against him in the matter of costs as the amount realised

by sale had discharged the costs of the suit, was accepted.

2. That decision applies to the facts of this case and the sum of Rs. 1640 realised by way of sale proceeds should first be appropriated towards

interest and costs of the suit and the appeal. There will be an order accordingly, the order of the lower Court being vacated. The execution petition

will have to be amended in the light of the foregoing observations and the execution will proceed only on this basis. The first respondent will pay

the appellants' costs of this miscellaneous appeal. No leave.