
(2001) 12 AP CK 0082
In the Andhra Pradesh High Court
Case No : CRP No. 3005 of 2000

Devavathina Paradesaiah by LRs.

APPELLANT

Vs

State Bank of India, Kavali

RESPONDENT

Date of Decision : 18-12-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 22, Order 21 Rule 64, Order 21 Rule 66, Order 34 Rule 15, Order 34 Rule 15(2)
Provincial Insolvency Act, 1920 — Section 28A
Transfer of Property Act, 1882 — Section 100, 55, 58, 83

Citation : (2002) 1 ALD 683 : (2002) 1 ALT 269

Hon'ble Judges : Ar. Lakshmanan, C.J; V.V.S. Rao, J

Bench : Division Bench

Advocate : T. Rajendra Prasad, for the Appellant; M. Narender Reddy, SC for SBI, for the Respondent

Judgement

Ar. Lakshmanan, C.J.—In this matter, P.S. Narayana, J., was considering the question regarding the Maintainability of Execution Petition on the ground that the decree holder had already filed a petition for passing of final decree and the said application was dismissed on the ground of limitation and, therefore, the decree holder was not entitled to ignore the same and file the execution petition. The learned Judge noticed a Division Bench judgment of this Court in Venugopala Swamy and Anjaneya Swamy Temples, Represented by its Executive Officer v. Vucha Narayana and Ors. 1988 (2) APLJ 40, wherein it was observed that Order 34 Sub-clause (2) of Rule 15 of CPC (CPC, for brevity) authorises the decree holder to execute the decree in default of payment of the amount by bringing the charged properties for sale in execution of the very decree under which the charge was created and there is no need to obtain a separate final decree in order to enforce this charge on the properties. The learned Judge also noticed another judgment of this Court in Maddali Tiruvengalam Vs. Saladi Ammanna and Others, , wherein it was held that though a decree declares a charge on the property is not one made under Order 34, Rules 14 and 15 CPC. The learned

Judge observed that in the light of the facts and circumstances of the case and also in the light of the general importance involved in the matter, he was inclined to refer the following two questions to be decided by a Division Bench of Supreme Court and directed the Registry to place the papers before the Hon"ble the Chief Justice for obtaining appropriate orders in this regard. That is how the matter has been placed before this Bench.

The questions to be decided are as follows:

1. Whether in view of Order 34 Rule 15(2) of CPC, the preliminary decree can be put into execution though the preliminary decree itself contemplates the obtaining of a final decree in pursuance of the preliminary decree.

2. Whether a party who was unsuccessful in an application for passing of final decree, can circumvent the proceedings by invoking the jurisdiction of the Court to execute the preliminary decree ignoring such orders which became final.

2. The short facts are as follows: The State Bank of India, Kavali Branch has filed a suit against the petitioners herein for recovery of Rs. 41,673-50 ps., being the principal and interest amount due on term loans and crop loans borrowed by one Sri Devabathina Paradesaiah (1st respondent) from the bank by executing hypothecation agreement for crops in the plaint schedule land and payable with interest being 1.5% per annum on the State Bank of India advance rate with a minimum of 15% per annum. A preliminary decree was passed on 7.12.1989 in the following terms:

(i) That the defendants 2 to 4 do pay in to Court on or before the seventh day of June, 1990 or any later date upto which time for payment may be extended by the Court, the said amount of Rs. 49,232/-with future interest at 6% per annum on Rs. 24,500/- till realisation.

(ii) That, on such payment and on payment thereafter before such date as the Court may fix, of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under Rule 10, together with such subsequent interest as may be payable under Rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the plaintiff will bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the defendants 2 to 4 or to such person as they appoint, and the plaintiff shall, if so, required, re-convey or retransfer the said property free from the said mortgage and clear of, and from all encumbrances created by the plaintiff or any person claiming under him or any person under whom he claims and shall, if so required, deliver up to the defendants 2 to 4 quite and peaceable possession of the said property.

(iii) And it is hereby further ordered and decreed that, in default of payment as aforesaid, the plaintiff may apply to the Court for a final decree for the sale of the mortgaged property; and on such application being made, the mortgaged

property or a sufficient part thereof shall be directed to be sold, and for the purposes for such sale the plaintiff shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged property.

(iv).....

(v) And it is hereby further ordered and decreed that if the money realised by such sale shall not be sufficient for payment in full of the amount payable to the plaintiff aforesaid, the plaintiff shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against the defendants 2 to 4 for the amount of the balance and that the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

3. The time for redemption was granted till seventh day of June, 1990. However, no application was filed by the judgment-debtors for extension of time for payment. No permission was also granted by the Court extending the time for payment from June, 1990. The judgment debtors did not pay any amount either in the Court or to the bank within the time specified in the decree i.e. till seventh day of June, 1990. A final decree petition under Order 34, Rule 5 CPC, was filed in IA. No. 284 of 1993 on 21.7.1993. According to the judgment Debtors, the application for grant of final decree, in terms of the preliminary decree, should have been filed in the Court within three years from the date of passing of the preliminary decree dated 7.12.1989, but the bank has filed the petition for grant of final decree on 21.7.1993 long after the expiry of the limitation period. By reason of the order dated 21.3.1996, the Court below dismissed the said petition as barred by limitation.

4. The bank thereupon filed E.P. No. 10 of 1997 under Order 21, Rules 22, 64 and 66 CPC, as against the judgment debtors for recovery of E.P. amount of Rs. 56,612/- together with costs of Rs. 344.75 ps., by sale of the charged immovable properties. On receipt of notice, judgment debtor No. 2 filed his counter stating that the execution petition is not maintainable in law and that the petition filed by the bank for passing of final decree in terms of the preliminary decree was dismissed as barred by limitation on 21.3.1996 and that the said decision though appealable has become final and conclusive between the parties and, therefore, the bank is not entitled to ignore the same and file the execution petition. The Court below formulated the point for consideration, as to whether the execution petition is maintainable in law basing on the preliminary decree even though the final decree petition was dismissed.

5. The judgment debtor No. 2 in support of his contention in the Court below relied on the decision of this Court in Venugopala Swamy and Anjaneya Swamy Temples v. Vucha Narayana. The main contention urged was that when once decree holder obtained a negative order in the final decree petition, he cannot

execute the preliminary decree. Another decision reported in *Raddulal v. Mahabirprasad*, AIR 1951 Nag. 269, was also relied upon wherein it was held that since the whole suit had abated the preliminary decree for foreclosure was a nullity. However, the Senior Civil Judge, Kavali by order dated 9.8.1999 held that the final decree petition was dismissed only for the reason that the petition was filed beyond the period of three years limitation and therefore the reasons for dismissal of the final decree petition in the decision cited by the judgment debtor and the dismissal of the final decree petition in the present case are quite different with each other. The learned lower court had further held that the object of filing of final decree petition is only just to confirm the non-satisfaction of the preliminary decree and also to treat the earlier decree as a preliminary decree, and that the scope and object of filing of final decree petition is not again to challenge the authenticity of the preliminary decree passed. The Court further held that the filing of final decree is only for technical reason and further to provide an opportunity to the judgment debtors to clear off the preliminary decree debt and thereby to relax the charge created over the mortgaged properties and that the object in calling upon the decree holder to file final decree petition is just to give a caution to the judgment debtors that the charged property will be sold in near future. The lower Court also in support of its conclusion relied on the decision of this Court *VENUGOPALASWAMY AND ANJANEYA SWAMY TEMPLES* case (supra) wherein it was held that there was no need to obtain a separate final decree in order to enforce charge on the properties. The Court also further held that the orders passed in IA No. 284 of 1993 in no way affects the validity of the preliminary decree passed in the suit in view of amended provisions of Order 34, Rule 15(2) CPC. The decree holder is entitled to proceed with the execution as against the charged properties. Therefore, the learned Senior Civil Judge was of the view that the decree holder was at liberty to file the execution petition basing on the preliminary decree within a period of twelve years from the date of passing of preliminary decree. The Court also observed that it was not case of the judgment debtors that the execution petition is barred by limitation. In the result, the learned Senior Civil Judge held that the execution petition is maintainable irrespective of the order passed in IA. No. 284 of 1993 dated 21.3.1996.

6. Aggrieved by the order, the present revision petition was filed. The petition was admitted on 21.3.2000 and interim stay was also granted staying the execution,

7. We heard the learned counsel appearing for the parties on either side.

8. Learned Counsel appearing for the petitioners-judgment debtors submitted that the execution petition filed by the bank without passing of final decree is not maintainable and that the Judgment of this Court in *VENUGOPALASWAMY AND ANIANEYA SWAMY TEMPLES* case is not applicable to the facts of the present case and that while passing the preliminary decree the lower court has not created any charge over the property and therefore passing of the final decree is

a must. It is further submitted by the learned counsel that the respondent-bank having obtained a negative order in IA. No. 284 of 1993 in the petition filed for passing of final decree, is estopped from executing the decree. The learned Counsel reiterated the other submissions made before the lower Court by the judgment debtors.

9. The learned Counsel appearing for the respondent-bank has also reiterated the submissions made by the bank before the lower court.

10. We have perused the entire pleadings and the orders passed by the lower Court in IA. No. 284 of 1993 and the order passed in E.P. No. 10 of 1997 and considered the arguments advanced by the learned counsel appearing on either side.

Rule 15 of Order 34 CPC, runs as follows:

Mortgages by the deposit of title-deeds and charges :--(1) All the provisions contained in this Order which apply to a simple mortgage shall, so far as may be, apply to a mortgage by deposit of title-deeds within the meaning of Section 58, and to a charge within the meaning of Section 100 of the Transfer of Property Act, 1882 (4 of 1882).

(2) Where a decree orders payment of money and charges it on immovable property on default of payment, the amount may be realised by sale of that property in execution of that decree.

11. We have earlier reproduced the preliminary decree passed in the suit. The decree passed by the lower court in the instant case is a composite decree, namely, personal decree as well as mortgage decree. In our opinion, if the composite decree is a decree which is both personal decree as well as mortgage decree, without any limitation on its execution, the decree holder, in principle, cannot be forced to first exhaust the remedy by way of execution of mortgage decree alone and told that only if the amount recovered is insufficient he can be permitted to take recourse to the execution of the personal decree.

12. The Supreme Court had an occasion to consider the meaning to be given to the expression in "final decision" in Venkata Reddi and Others Vs. Pothi Reddi, , occurring in the first proviso to Section 28-A of Provincial Insolvency Act 1920 (Act No. 5 of 1920). The Supreme Court held:

The short question, therefore, is whether the preliminary decree for partition passed in this case which was affirmed finally in second appeal by High Court Madras can be regarded as a final decision. The competence of the court is not in question here. What is, however, contended is that in a partition suit the only decision which can be said to be a final decision is the final decree passed in the case and that since final decree proceedings were still going on when the Amending Act came into force the first proviso was not available to the appellants. It is contended on behalf of the appellants that since the rights of the parties are adjudicated upon by the Court before a preliminary decree is passed

that decree must, in so far as rights adjudicated upon are concerned, be deemed to be a final decision; The word "decision" even in its popular sense means a concluded opinion (see Stroud's judicial Dictionary--3rd ed. Vol. 1, p. 743). Where, therefore, the decision is embodied in the judgment which is followed by a decree finality must naturally attach itself to it in the sense that it is no longer open to question by either party except in an appeal, review or revision petition as provided for by law. The High Court has, however, observed:

"The mere declaration of the rights of the plaintiff by the preliminary decree, would, in our opinion not amount to a final decision for it is well known that even if a preliminary decree is passed either in a mortgage suit or in a partition suit, there are certain contingencies in which such a preliminary decree can be modified or amended and therefore would not become final."

It is not clear from the judgment what the contingencies referred to by the High court are in which a preliminary decree can be modified or amended unless what the learned judges meant was modified or amended in appeal or in review or in revision or in exceptional circumstances by resorting to the powers conferred by Sections 151 and 152 of the Code of Civil Procedure. If that is what the High court meant then every decree passed by a Court including decrees passed in cases which do not contemplate making of a preliminary decree are liable to be modified and amended. Therefore, if the reason given by the High court is accepted it would mean that no finality attaches to decree at all. That is not the law. A decision is said to be final when so far as, the court rendering it is concerned, it is unalterable except by resort to such provisions of the CPC as permit its reversal, modification or amendment. Similarly, a final decision would mean a decision which would operate as *res judicata* between the parties if it is not sought to be modified or reversed by preferring an appeal or a revision or a review application as is permitted by the Code. A preliminary decree passed, whether it is in a mortgage suit or a partition suit, is not a tentative decree but must, in so far as the matters dealt with by it are concerned, be regarded as conclusive. No doubt, in suits which contemplate the making of two decrees--a preliminary decree and a final decree the decree which would be executable would be the final decree but the finality of a decree or a decision does not necessarily depend upon its being executable. The legislature in its wisdom has thought that suits of certain types should be decided in stages and though the suit in such cases can be regarded as fully and completely decided only after a final decree is made the decision of the court arrived at the earlier stage also has a finality attached to it. It would be relevant to refer to Section 97 of the CPC which provides that where a party aggrieved by a preliminary decree does not appeal from it, he is "precluded from disputing its, correctness in any appeal which may be preferred from the final decree. This provision thus clearly indicates that as to the matters covered by it, a preliminary decree is regarded as embodying the final decision of the Court passing that decree.

13. The Apex Court held that a preliminary decree passed, whether in a

mortgage suit or partition suit, is not a tentative decree but should be regarded as conclusive in respect of the matters dealt with within the preliminary decree. Although the legislature provides for a preliminary decree and a final decree to be passed in certain matters and the final decree alone is executable, however, that would not mean that a preliminary decree is a tentative decree or an interlocutory order. The provisions of Section 97 of CPC, attached finality to the preliminary decree in respect of the matters decided by it. In view of Section 97 CPC, where a party aggrieved by the preliminary decree does not appeal from it, he is precluded from disputing its correctness in any appeal, which may be preferred from the final decree. The same principle is reiterated in *M. Manickchand and Others Vs. Elias Saleh Mohamed Sait and Another*, . In the said case, it was also held:

A preliminary decree in a suit for accounts cannot be said to be a mere interlocutory order. Such a decree finally decides the points which the Court is required to decide at that stage or chooses to decide at that stage. The judgment of the High Court, dated 13.2.1951, having become final, it is no longer open to the appellants to raise the ground of non-maintainability of this suit because of the earlier proceedings u/s 83 of the T.P. Act. The first point raised by learned counsel has, thus, no force.

14 . In the above case, it was argued that the suit for accounts should be held to be not maintainable in view of the proceedings u/s 83 of Transfer of Property Act which preceded the suit and under which the mortgagee received the sum in discharge of the mortgage, delivered the necessary documents to the mortgagors and also gave possession of the mortgaged property. While rejecting the said contention, the Supreme Court held that a preliminary decree in a suit for accounts cannot be said to be a mere interlocutory order. Such a decree finally decides the points which the Court is required to decide at that stage or chooses to decide at that stage. The judgment of the High Court dated 13.2.1951 having become final, it is no longer open to the appellants to raise the ground of non-maintainability of the suit because of the earlier proceedings u/s 83 of the T.P. Act.

15. In *State Bank of India Vs. Messrs. Indexport Registered and others*, , the Supreme Court was considering a case of decree which is simultaneous and joint and several against all the defendants including the guarantor. The Supreme Court in the said case held that decree does not postpone the execution and it is the right of the decree holder to proceed with it in a way he likes. In para 22 of the said judgment the Apex Court has observed that the decree for money is a simple decree against the judgment-debtors including the guarantor and in no way subject to the execution of the mortgage decree against the judgment No. 2 therein and if on principle a guarantor could be sued without even suing the principal debtor there is no reason even if the decretal amount is covered by the mortgaged decree, to force the decree-holder to proceed against the mortgaged property first and then to proceed against the guarantor. The Supreme Court has

further observed:

.... If the composite decree is a decree which is both a personal decree as well as a mortgage decree, without any limitations on its execution, the decree holder, in principle, cannot be forced to first exhaust the remedy by way of execution of the mortgage decree alone and told that only if the amount recovered is insufficient, he can be permitted to take recourse to the execution of the personal decree. For a simple mortgage decree as prescribed in Form No. 5 of Appendix D of the CPC it could be so because the decree provides like that. It is only when the sum realised on sale of the mortgaged property is insufficient then the judgment debtor can be proceeded with personally.

16. In the result the Supreme Court allowed the appeal and set aside the orders of the High Court and the learned Additional District Judge and held that the decree holder is entitled to proceed against the guarantor (judgment debtor No. 4) for the execution of the decree.

17. In *Kumar Sudhendu Narain Deb Vs. Mrs. Renuka Biswas and others*, , the Apex Court held:

It is to be remembered that both the preliminary decree and final decree are passed under Order 34 of the CPC in one and the same suit, in which two decrees may be required to be passed at separate stages. And both being formal adjudications appropriate to the stage are formal expressions of decision of the Court. At the stage of the preliminary decree there arises no question of the property under mortgage being put to sale in execution of the decree, and if that is so the ultimate auction purchasers cannot be held seemingly to be a party to the suit up to the stage of the preliminary decree. In our opinion, the converse interpretation that the auction purchaser at a sale and execution of the final decree shall be deemed; to be a party to the suit at and prior to the stage when preliminary decree is passed, unless sustaining, would be contrary to the spirit and scheme of Order 34 of the Code of Civil Procedure. And since all questions arising between the parties to the suit in which the decree was passed, or their representatives and relating to the execution, discharge or satisfaction of the decree are required to be determined by the Court executing the decree and not by a separate suit, the objection of the appellant judgment-debtor with regard to the knocking out of the original preliminary decree was to our mind sustainable. In terms of the preliminary appellate decree and fulfilment of the obligations of the defendants on payment of the sum as struck, there remained no occasion for entertaining, maintaining or sustaining the application of the plaintiff mortgagees for sale of the property mortgaged and on that basis the auction sale in favour, of the auction purchasers and confirmation of that sale automatically becomes non-est. We are thus of the considered view that the High Court went wrong in rejecting the objection of the appellant judgment-debtor.

18. A judgment rendered by a Division Bench of this Court in *VENUGOPALA SWAMY TEMPLES* case (*supra*) can be beneficially looked into in the present

context. The execution of a decree obtained by the plaintiff therein for recovery of arrears of maktha due from the defendant by way of sale of properties charged therefore was called for decision in a revision petition before the High Court, the execution court having held that the remedy of the petitioner is to obtain a final decree and bring the charged properties for sale thereafter. In support of the said conclusion, the lower court had relied upon the decision of this Court in *Tiruvengalam v. Ammanna* (supra). In *Tiruvengalam v. Ammanna* it was held that where the decree of a Court simply declared a charge on the property but does not direct the sale of the property in enforcement of that claim, it is declaratory decree for the enforcement of which a suit will have to be instituted. The trial Court following the above principle held that decree is not executable inasmuch as the decree holder has failed to obtain a final decree in pursuance of the decree obtained by him. When the matter came up for hearing in a revision before a learned single Judge of this Court, it was submitted by the learned Counsel appearing in the said case that in the case relied upon by the lower Court there was a pre-existing statutory charge u/s 55 of the Transfer of Property Act, whereas in the instant case the charge was created by the Court for the first time without reference to any pre-existing statutory charge. Since the question raised was of considerable importance requiring decision by a Division Bench, the learned single Judge of this Court directed that the matter be placed before a Division Bench. At this stage, it may be noticed that Kodandaramayya, J., a learned Judge of this Court in *Ramamandiram v. Raghavamma* dealing with the provisions of Sub-rule (2) of Rule 15 of Order 34 CPC, held:

The very object of Sub-rule (2) of Rule 15 of Order 34 CPC is, in respect of decree creating charges there is no necessity of filing a separate suit or obtaining a separate final decree treating the directions in the decree as a preliminary decree. Hence the present Sub-rule 2 clearly authorises the decree-holder to execute the decree in default of payment of the amount by bringing the property for sale in execution of the very decree where the charge was created. On a true construction of Order 34, Rule 15(2) CPC read with Section 97(2) of Act 104 of 1976 there is no necessity of obtaining a separate final decree to enforce the decree of a charge since the advent of the amending Act 104 of 1976. The provision amending Order 34, Rule 15 is not one enumerated in Sub-section (2) of Section 97.

19. The Division Bench in *VENUGOPALA SWAMY TEMPLES* case following the decision in *Ramamandiram v. Raghavamma* held:

Under Rule 15(2) CPC, it is clearly provided that when a charge is created on any immovable property under a decree, the amount may be realised by sale of that property in execution of that decree. Even a plain of Sub-rule (2) of Rule 15 CPC., makes it clear that there is no necessity of filing a separate suit or obtaining a final decree treating the earlier preliminary decree. The provisions of Sub-rule (2) of Rule 15 of Order 34, CPC have has been considered

Ramamandiram v. Raghavamma, and a similar view has been taken holding *inter alia*, that the very object of Sub-rule (2) of Rule 15 of Order 34 CPC, is in respect of decree creating charges and there is no necessity of filing a separate suit or obtaining a separate final decree treating the direction in the earlier decree as a preliminary decree. Hence, the present Sub-rule (2) of Rule 15 of Order 34, CPC, clearly authorises the decree holder to execute the decree in default of payment of the amount by bringing the charged property for sale in execution for the very decree under which the charge was created. Hence, it is clear that under the added Sub-rule (2) of Rule 15 of Order 34, CPC. there is no need to obtain a separate final decree as held by the lower Court. It is, therefore, held that the decrees in both the CRPs can be executed without the decree holder obtaining separate final decree in order to enforce the charge on the properties in question. The decrees of both the lower courts are set aside and the CRPs are allowed, but in the circumstances, there will be no order as to costs.

20. For the foregoing reasons, we are of the opinion that Sub-rule (2) of Rule 15 of Order 34 clearly authorises the decree holder to execute the decree in default of payment of the amount by bringing the charged property for sale in execution of the very decree under which the charge was created. In our opinion there is no need to obtain a separate final decree under Sub-rule (2) of Rule 15 of Order 34 CPC, as contended by the learned counsel appearing for the Judgment debtors. We are of the opinion that the decree can be executed without the decree holder obtaining a separate final decree in order to recover the amount decreed under the suit.

21. The reference is answered accordingly.