
(1958) 04 MP CK 0025
In the Madhya Pradesh High Court
Case No : First Appeal No. 16 of 1958

Dhannalal Sardarmal

APPELLANT

Vs

Seth Noshirwanji Goderej and Another

RESPONDENT

Date of Decision : 25-04-1958

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 5
Madhya Bharat Interest Act, 1956 — Section 3

Citation : AIR 1958 MP 321 : (1959) 4 MPLJ 462

Hon'ble Judges : V.R. Newaskar, J; T.C. Shrivastava, J

Bench : Division Bench

Advocate : W.Y. Pande, for the Appellant; S.D. Sanghi and R.G. Waghamare, for the Respondent

Final Decision : Dismissed

Judgement

V.R. Newaskar, J.

This is an application for stay of further proceedings consequent upon passing of the preliminary decree which is under appeal in this case.

Mr. Pande for the applicant relies upon the decisions in Karam Elahi v. ML Amirunnisa AIR 1930 Lah 103 (A) and Diwan Chand v. Nanak Chhmd AIR 1932 Lah 271 (B), in support of the contention that where an appeal is preferred against a preliminary mortgage decree the subsequent proceedings for passing of the final decree should generally be stayed.

This is no doubt held in the aforesaid cases. But these msCS relied upon two earlier decisions of that Court reported in Rup Narain v. Shibbu Mal 107 Ind Gas 486 (Lah) (C) and Chhotelal v. Sultansingh, 111 Ind Cas 383 (Lah) (D). The former is a decision by Dalip Singh, J., who relied upon the Full Bench decision of Allahabad High Court in Gajadhar Singh Vs. Kishan Jiwan Lal and Others, , for the view that there cannot be more than one final decree in a suit for sale upon a mortgage and that essential condition for the making of a final decree is the

existence of a preliminary decree which has become conclusive between the parties.

The second case viz. III Ind Cas 383 (Lah) (D), laid down that proceedings in connection with a final decree in that case ought to be stayed. In the former case Justice Dalip Singh observed that he was not prepared to endorse the reasoning of the Full Bench of the Allahabad High Court but thought it proper in that case to stay further proceedings.

This decision therefore cannot be read as supporting the proposition that once a preliminary decree is appealed against it is incompetent to pass a final decree or that the proceedings for final decree should be stayed as a matter of course. In fact the learned Judge rightly pointed out, the presence of a final decree does not make the appeal against preliminary decree unmaintainable. Mr. Pande therefore is not right when he says that in case a final decree is passed his appeal against the preliminary decree may be rendered ineffective unless he preferred appeal against the final decree.

The decisions in AIR 1930 Lah 108 (A) and AIR 1932 Lah 271 (B) relied upon by Mr. Pande being practically based on the aforesaid two decisions of the Lahore High Court we really will have to examine how far the observations of the Full Bench in Gajadhar Singh Vs. Kishan Jiwan Lal and Others, as indicated above and approved of by the Privy Council in Jowand Hassain v. Gendan Singh, AIR 1926 PC 93 (F), should be taken to lead to the inference that where an appeal is preferred against a preliminary mortgage decree an order for the stay of further proceedings for passing final decree ought to be made.

This question has been considered in another Full Bench decision of Allahabad High Court reported in Sat Parkash v. Bahal Rai, AIR 1931. All 386 (G). The decisions in Gajadhar Singh Vs. Kishan Jiwan Lal and Others, and AIR 1926 PC 93 (F) were" sought to be distinguished on the ground that in those cases on the date when an application for final decree was made the preliminary decree passed by the trial Court got merged in the preliminary decree passed in appeal. The observations in Gajadhar Singh Vs. Kishan Jiwan Lal and Others, to the following effect

"It is impossible to hold that there can be more final decrees than one in a suit for sale upon a mortgage"

were construed to mean that on the date when the plaintiff presented his application for final decree there could not be more than one final decree.

Reference was made by the later Full Bench of Allahabad High Court to the provision of Order 41 Rule 5 C. P. C. and it was observed that the said provision made it clear that an appeal does not operate as stay of proceedings under a decree or order appealed from and that proceedings relating to passing of a final decree in a mortgage suit must be held to be "proceedings under a decree."

It was pointed out that in case the legislature intended to oust the jurisdiction of

the trial Court as soon as an appeal is preferred against a preliminary decree it would have said so instead of observing to the contrary. Amendments introduced in Order 34 Rule 4 C. P. C. by Act No. 21 of 1929 were also referred to and relied upon for the view that it is competent for the trial Court to proceed with the passing of a final decree for sale even though an appeal might have been preferred against that decree.

Lahore High Court itself in a later decision in *Bashesar Nath Khanna and Sons v. Messrs. Grindlay and Co. Ltd.* AIR 1935 Lah 181 (1) (H), has not followed its earlier decisions and has held that the mere fact that an appeal has been filed against a preliminary decree is no justification whatsoever for staying the hand of the Court below and ordering it not to go on in the ordinary course with the proceedings leading up to final decree. According to the view taken in that case the final decree would not do any harm to any party. On the other hand, it was said, in case the defendant's appeal be unsuccessful execution of the decree might be expedited. I respectfully agree with this view.

Addison J., expressed practically the same view in *Banwari Lal v. Nanak Chand* AIR 1933 Lah 724 (I). It is significant that the learned Judge referred to his earlier decision, in 111 Ind Cas 383 (Lah) (D) and pointed out that the head-note in the report was misleading and that he had not used the word "generally quoted in the head-note."

It is not necessary to refer to other cases cited at the bar as the points dealt with in them are covered by the aforesaid decisions.

It therefore follows that it is in each case a matter resting with the discretion of the appellate court under Order 41 Rule 5 C. P. C., whether it ought to stay further proceedings for the final decree.

In the present case the ground on which the stay of further proceedings is sought is that the mortgage security is more than enough to cover the liability under the decree and further that an important question of law as regards the applicability of Section 3 of the Madhya Bharat Interest Act is involved. From the bar it was also said that only one month's time was given although the maximum period is of six months.

In my opinion these cannot be said to be sufficient grounds for staying further proceedings. The continuance of proceedings for final decree can do no effective injury to the appellant except that in the event of his being unsuccessful perhaps the execution of the decree might be expedited. Moreover the principal amount is substantial and mere offer to deposit interest per month cannot be considered to be enough to direct the stay of further proceedings. As regards the grant of time it was a matter within the discretion of the trial Court."

The petition is therefore rejected and the interim order for stay granted earlier is hereby vacated.

T.C. Shrivastava, J.

I agree.