
(1950) 03 MAD CK 0033
In the Madras High Court
Case No : A.A.O. No. 174 of 1946

Goli Paddaraju and Others

APPELLANT

Vs

Mattapalli Raju and Another

RESPONDENT

Date of Decision : 22-03-1950

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 34 Rule 5

Citation : AIR 1951 Mad 381 : (1942) 55 LW 993 : (1950) 2 MLJ 537

Hon'ble Judges : Subba Rao, J;Panchapakesa Ayyar, J

Bench : Division Bench

Advocate : V. Parthasarathy, for the Appellant; G. Balaparameswari Rao, for the Respondent

Final Decision : Dismissed

Judgement

Subba Rao, J.—The mortgagors are the appellants. The history of this litigation is found in the judgment of Wadsworth and Patanjali Sastri

JJ. in A.S. No. 463 of 1911. It is not necessary to restate the facts as they have been fully stated in that judgment. It will be enough if we notice the

relevant facts sufficient for disposing of this appeal. The respondents obtained a preliminary decree on two mortgages on 17-8-1928 against the

appellants and others. The final decree was passed on 16-9-1929. Defendants 3 and 15, who are the purchasers of portions of the hypotheca,

preferred an appeal to " the High Court, being A.S. No. 33 of 1929. That appeal was disposed of on 8-12-1933. The preliminary decree was

modified in some respects. Whereas under the decree of the Subordinate Judge, all the mortgaged properties were directed to be sold in the order

mentioned in the mortgage deed, in the appeal the High Court directed that the properties purchased by defendants 3 and 16 should be sold last.

With this modification the appeal was dismissed. Before the appeal against the preliminary decree was disposed of, the final decree was executed

and the decree-holder purchased the properties, and the decree was satisfied in part. The decree-holder filed Application No. 6 of 1937 on 8-12

1936 for the passing of a fresh final decree, while the judgment-debtors filed an application under Madras Act IV [4] of 1938 for scaling down the

decree debt. For tactical purposes the plaintiffs obviously withdrew their application, and the application was accordingly dismissed. In the

application filed by the judgment-debtors for scaling down the decree debt, it was scaled down. The plaintiffs preferred an appeal to the High

Court, being A.S. No. 463 of 1941. The learned Judges held that the amount due under the decree after giving credit to the amounts realised by

the sale of the properties should be scaled down. When the mortgagors brought to the notice of the Court that they had filed an application in the

lower Court for restitution of the properties sold, the learned Judges reserved the right of the mortgagors to proceed with that application. After the

disposal of A. S. No. 463 of 1941, the restitution application was taken up and the learned Subordinate Judge dismissed the same. The

mortgagors have preferred the above appeal.

2. The only question that arises in the appeal is whether a sale held in execution of a final decree would be void if subsequently, in an appeal filed

against a preliminary decree, the final decree was modified, though the said modification did not affect the right of the mortgagee to proceed against

the properties concerned. The learned counsel for the appellants contended that in a mortgage action there can be only one final decree, that when

in the appeal against the preliminary decree the appellate Court modified the preliminary decree the final decree lost its legal force, that the sale

held pursuant to the final decree was void and therefore that the judgment-debtors would be entitled to a restitution of the properties so sold

leaving the mortgagees to work out their rights by filing a fresh application for the passing of the final decree. This argument was based upon some

observations made by the Judicial Committee and by the High Courts in the various decisions cited before us. In *Jowad Hussain v. Gendan Singh*,

6 Pat. 24: A. I. R. 1926 P. C. 93 the question for consideration was whether the time for filing an application for the passing of the final decree

Should be computed from the date of the appellate decree or from the date of the original decree. The Judicial Committee held that the period of

limitation would run from the date of the appellate decree, though the appellate decree only confirmed the original decree. In the course of the

judgment they expressed their approval of the view of the Allahabad High Court in the decision in Gajadhar Singh Vs. Kishan Jiwan Lal and

Others, to the effect that a mortgage action contemplates the passing of only one final decree in a suit for sale upon a mortgage. The Patna High

Court in another decision Somar Singh and Others Vs. Deonandan Prasad Singh and Others, , held that an application for enforcing a final decree

for sale in a mortgage suit was an application for execution and was governed by Article 182 and not by Article 181, Limitation Act. This view is

not sound in view of the later decisions. At p. 787 the learned Judges say;

In the case now before us the final decree for sale which was made on 28-10-1922 during the pendency of the appeal, against the preliminary

decree was clearly Imperilled by the appeal, and the decree made by the High Court on 29-10-1925, clearly supplemented and completed the

decree on 28-10 1922.

The observation does not touch the question to be decided in this case. Whenever an appeal is filed against the decree of an original Court,

Certainly it is imperilled, as the appellate Court may modify, confirm or allow the appeal and the decree of the lower Court is necessarily subject to

the decision of the appellate Court. The observations of the learned Judges in Janki Das and Another Vs. Sheo Prasad and Another, , were also

pressed into service by the learned counsel. The question in that case was whether an appellate Court had power to stay execution of a final

decree although no appeal was filed from the preliminary decree. In the course of that judgment they observed:

It cannot be denied that any interference with the preliminary decree in the appeal there from would have the effect of the final decree being

vacated, and that if execution of the final decree is allowed to proceed, rights may come into existence before the disposal of the appeal from the

preliminary decree.

It is no doubt true that if a preliminary decree is modified, to that extent, the final decree will have to be modified, as otherwise the final decree will

be inconsistent with the preliminary decree. The wide observations made by the learned Judges in connection with a different argument cannot be

utilised in support of an argument which was neither raised nor considered by the Court in that case. In *Taleb Ali and Another Vs. Abdul Aziz and*

Others, the learned Judges held that an appeal from a preliminary decree was not incompetent if a final decree was made before the appeal was

presented. The observations relied upon are found at p. 1038:

In my judgment, the final decree is, in its nature, dependent and subordinate, because it is a decree which has been passed as a result of

proceedings directed and controlled by the preliminary decree and based thereon." These observations need not be questioned. But at p. 1039

they also observed:

I would add that when a preliminary decree is set aside, the final decree is superseded, whether the appeal was brought before or after the

passing of the final decree and that, in my judgment, an appellate Court, when setting aside or varying a preliminary decree, can, and indeed should

give directions for the setting aside or varying of the final decree, if the existence of the final decree is brought to its notice, as in all cases it ought to

be.

These observations indicate that the proper modifications can be embodied in the final decree if in an appeal against the preliminary decree the

original decree was varied. In *Periakaruppan v. Venugopal*, I. L. B. (1947) Mad. 132; A. I. R. 1946 Mad. 383, a Bench of this Court had to

consider the scope of a decree of the appellate Court in appeal against the preliminary decree. The facts in that case are that a preliminary

mortgage decree was passed on 4-5-1929. A final decree was passed on 23-9-1933. On 26-11-1934 is the appeal against the preliminary

decree, the decree amount was reduced. No fresh final decree was passed. The decree-holder filed two execution applications for executing the

final decree passed on 23-9-1933 and on 31-3-1942. Along with the second execution application, he filed an application for amendment of the

execution petition by substituting the amount awarded by the appellate decree in place of the amount awarded by the final decree of 23-9-1933.

The District Judge allowed the amendment and directed execution to proceed. It was argued that the application was barred by time. In dealing

with that question, the learned Judges made the following observations :

If this function of a final decree for sale is borne in mind it becomes clear that on principle there ought not to be any distinction between a case of

an affirmance and a case of variation of the preliminary decree by an, appellate Court. The final decree passed in the case, if it was passed before

the disposal of the appeal against the preliminary decree, would in our opinion automatically operate on the preliminary decree as affected by the

decision of the appellate Court. It might be affected to a greater or lesser degree. The alterations which may be necessary, if they have to be made

formally in the final decree already passed, would be practically the same whether the appellate decree is one of affirmance or of variation.

In this case when the properties were sold, the final decree was in force. Subsequent to the sale the preliminary decree was only modified in regard

to the order prescribed for sale. Even that modification only gave relief to defendants 3 and 15. The said defendants are not now questioning the

sale of their properties, The preliminary decree passed by the Subordinate Judge in so far as the appellants are concerned was not even modified

by the appellate Court. In the circumstances, following the observations of the learned Judges in the above case, we have no hesitation in holding

that the sale held in execution of the final decree passed on 16.9.1929 was valid and binding on all the parties concerned.

3. The order of the lower Court is right, and the appeal is dismissed with costs.