

(1912) 12 MAD CK 0021
In the Madras High Court

Kuppusamy Aiyar

APPELLANT

Vs

Regmah Boi Ammani and Others

RESPONDENT

Date of Decision : 19-12-1912

Acts Referred:

Citation : 18 Ind. Cas. 730 : (1913) 24 MLJ 190

Hon'ble Judges : Sankaran Nair, J; Sadasiva Aiyar, J

Bench : Division Bench

Judgement

1. A preliminary decree was passed on the 15th January 1910 in a suit by a mortgagee declaring the amount payable to him and in default of payment directing the sale of the mortgaged property. The appellant filed an appeal on the 27th June against that decree. On the 15th August, before that appeal was heard, the final decree for sale was passed and the Subordinate Judge has held, following certain Calcutta and Allahabad decisions, *Mackenzie v. Narasingh Sahai* 10 C.L.J. 113 *Kuria Mal v. Bishambar Das* 7 A.L.J. 210 and *Narain Das v. Balgobind* 8 A.L.J. 604 that the defendant not having appealed against the final decree, his appeal from this preliminary decree is not sustainable. This is an appeal from that decision. The appellant relies upon the decisions in *Lakshmi v. Maru Devi* 21 M.L.J. 1063 and *Ramien v. Veerappudian* 22 M.L.J. 217. In addition to the cases cited, the first respondent's Pleader also relies upon the case of *Akhtar Husain Khan v. Tasaduk Husain* 10 A.L.J. 19. It is not denied that the appellant is entitled to appeal against the preliminary decree. Under the Code, he is bound to appeal against it. For u/s 97, in an appeal against the final decree, he is precluded from disputing the correctness of the preliminary decree, which, therefore, continues to subsist in

force in so far as the rights and liabilities declared thereby are concerned. If he is bound to appeal against that decree, then his appeal has to be dealt with by the Appellate Court according to the provisions of the Civil Procedure Code. See Part VII and Order XLI. There is no provision enabling the Appellate Court to dismiss the appeal on the ground that a final decree has been passed. It is true that if the matter in dispute before the Appellate Court has been decided in another proceeding between the parties and that decision has become final, then the appeal has to be decided in accordance with it, either by confirming the decree appealed from or by reversing it. But this is very different from saying that the appellant is not entitled to have his appeal heard and decided. The final decree for sale passed in the mortgage suit does not deal with the matters already disposed of by the preliminary decree. It is to the effect that the payment directed by the said decree not having been made, the properties or a portion of them will be sold to carry on the directions in the preliminary decree. Without such preliminary decree, there is nothing in this decree itself which settles the right of parties: the decree itself is declared to operate on account of the preliminary decree not having been complied with. If, therefore, the preliminary decree is reversed, and there is nothing for the appellant to comply with, the final decree, so far as it is dependent on the other; falls with it and becomes inoperative. It is on this ground that it has been decided by this Court that when an order of remand or an order granting an application for review is reversed, the decree that may have been passed on remand or review becomes of no effect, and, accordingly, the final decrees in such cases have been held to be no bar to the entertaining of appeals against orders of remand or granting applications for review. We see no reason, therefore, to depart from the decisions of this Court. We reverse the decree of the Court below, direct the Subordinate Judge to restore the appeal to his file and dispose of it in accordance with law. The costs in this Court and the lower Court will be dealt with by the final decree.