

(2010) 08 MAD CK 0448

In the Madras High Court

Case No : C.R.P. (NPD) (MD) No. 2065 of 2008 and M.P. (MD) No's. 1 and 2 of 2010

P. Samsudin and Others

APPELLANT

Vs

Mohamad Yusuf and Others

RESPONDENT

Date of Decision : 13-08-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 35

Citation : (2011) 2 BC 701

Hon'ble Judges : R.S. Ramanathan, J

Bench : Single Bench

Advocate : K. Venkatraman, for the Appellant; R. Suriyanarayanan, for the Respondent

Final Decision : Dismissed

Judgement

R.S. Ramanathan, J.—Heard both sides.

2. The judgment debtors in O.S. No. 17 of 92, of on the file of the District Munsif Court, Melur, are the revision Petitioners. One Md. Abdul Khader Alim Sahib, the father of the Respondents borrowed a sum of Rs. 2,000/- from M. Peer Mohammad Rowther, who is the father of the revision Petitioners on 20.10.1966 and executed a "othi" in respect of "A" schedule property and the period of redemption was five years and on 9.4.1978 another "othi" was executed by Md. Abdul Khader Alim Sabhib for a sum of Rs. 7,000/- in favour of M. Peer Mohammad Rowther in respect of "B" schedule property and was redemption period was also five years. As per "othi" the mortgagee was authorised to effect repairs and maramaths at his own costs and recover the amount spent by him along with mortgage amount with interest. The father of the revision Petitioners viz. M. Peer Mohammad Rowther, the nor effected necessary repairs to the property and the mortgagor, the father of the Respondents did not repay the same. Nevertheless, the mortgagor suit for redemption of "othi" in O.S. No. 17 of 1992 by depositing the office account of Rs. 9,000/- and after full trial, the

learned District Munsif, passed a preliminary decree on 18.8.1994 directing the mortgagors/the revision Petitioners herein to pay a sum of Rs. 169.18 towards the maramath expenses and taxes. Aggrieved by the preliminary decree, M. Peer Mohammad Rowther, the mortgagee filed A.S. No. 103 of 1994, on the file of the Principal Sub-Judge, Madurai and during the Appeal, he died and the revision Petitioners herein were impleaded as legal heirs. During the pendency of the said Appeal, the Respondents filed I.A. No. 349 of 1997, on the file of the District Munsif, Madurai, to pass a final decree, in terms of preliminary decree and despite objections raised by the revision Petitioners that Appeal in A.S. No. 103 of 1994 is pending against the preliminary decree, final decree came to be passed on 15.12.1998. Against the preliminary decree, the First Appeal in A.S. No. 103 of 1994 was filed by the revision Petitioners and the First Appeal was partly allowed on 26.2.2003 and the preliminary decree was modified and the mortgagor, the Respondents herein, were directed to pay the maramath and tax amount of 9,149.24. Thereafter, the Respondents filed E.P. No. 484 of 2006 under Order 21 Rule 35, CPC for recovery of possession, after depositing the entire decree amount as per the modified preliminary decree passed in A.S. No. 103 of 1994. That was objected to by the revision Petitioners stating that as per the decree passed in A.S. No. 103 of 1994 only preliminary decree passed in O.S. No. 17 of 1992 was modified and, therefore, final decree was not passed on the basis of the modified preliminary decree and the Respondents herein, cannot execute the said decree passed in A.S. No. 103 of 1994, which is only preliminary decree without applying for final decree. That contention was negatived and against the same, this Civil Revision Petition is filed.

3. The Learned Counsel appearing for the revision Petitioners, Mr. R. Venkatraman, vehemently contended that only after passing of the final decree, execution can be filed to execute the decree and in this case, though the final decree was passed on 15.12.1998, that was passed only on the both of the preliminary decree, dated 18.8.1994 passed in O.S. No. 17 of 1992 and against the preliminary decree, A.S. No. 103 of 1994 was filed and that was partly allowed and the preliminary decree was modified and, therefore, unless the final decree is passed on the basis of the modified preliminary decree as per the judgment in A.S. No. 103 of 1994, the Respondents are not entitled to file the execution petition. He further submitted that in A.S. No. 103 of 1994, the preliminary decree was modified on 26.2.2003 and within three years, final decree application ought to have been filed and the Respondents have not filed the final decree application within three years and hence, they are also barred from redeeming the property and in support of his contention, he relied upon the Supreme Court judgment reported in the case of Achaldas Durgaji Oswal (Dead) through Lrs. Vs. Ramvilas Gangabisan Heda (Dead) through Lrs. and Others, .

4. On the other hand, the Learned Counsel appearing for the Respondents Mr. R. Sufianarayanan submitted that the judgment relied upon the by the Learned Counsel appearing for the revision Petitioners are not relevant to the facts of this case. He further submitted that the mortgagor the Respondents herein, even at

the time of filing the Suit for redemption deposited the entire mortgage amount and after the Appeal was disposed of, the enhanced amount was also deposited and hence, the Execution application is not barred by limitation and relied upon the judgment of the Hon'ble Supreme Court reported in the case of Sital Parshad Vs. Kishorilal, .

5. I have given my anxious consideration to the submission made by both the Counsel.

6. In this case, the point for consideration is whether after a preliminary decree modified in Appeal, in a Suit on mortgage whether final decree has to be passed on the basis of the modified preliminary decree or whether the mortgagor can execute the final decree passed on the original preliminary decree. This matter has been thoroughly discussed in the judgment reported in the case of Sital Parshad and Anr. v. Kishori Lal (supra), and in that judgment the Hon'ble Supreme Court upheld the judgment reported in Periakaruppan Chettiar Vs. Venugopal Pillai and Others, .

7. In the above judgment, it was held as follows:

In that case a preliminary mortgage decree had been passed on May 4, 1929 and there was an Appeal against it by one of the Defendants. Pending the Appeal, as further proceedings in the Suit had not been stayed, the Trial Court passed a final decree on September 23, 1933 on the basis of the preliminary decree passed on May 4, 1929. On November 26, 1934, the Appeal was allowed in part, which had the effect of reducing the amount decreed. No fresh final decree was passed on the basis of the Appellate decree. After the decision of the High Court the decree-holder filed an execution petition on September 23, 1936 to execute the final decree passed on September 23, 1933 and again another execution petition in 1939 and finally another one on March 31, 1942. Along with the last execution petition 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, dated September 23, 1933. The amendment was allowed by the first Court. Thereupon the judgment-debtor went in Appeal to the High Court contending that the application for amendment filed in March 1942 was barred by time as it was more than three years after the decree of the High Court in Appeal. The High Court dismissed this Appeal holding that the final decree already prepared can be executed with such modifications as may be necessary in the circumstances, whether the preliminary decree is affirmed in toto or is varied to any extent or in any particular in Appeal. The High Court further held that it was the duty of the Court which passed the final decree to carry out such modifications as might be necessary be reason of the decision of the Appellate Court in an Appeal against the preliminary decree when its attention was drawn to the necessity for such alternation by the decree-holder. So long as the decree was kept alive, there could be no bar of limitation to an application of this kind. Such an application really called upon the Court to carry out modifications which in law automatically took place in the final decree

already prepared before the decree of the Appellate Court.

8. The Hon'ble Supreme Court in that judgment upheld the above said judgment with slight modification and held as follows:

If an Appeal from a preliminary decree in a mortgage Suit one of the three things is possible. Firstly, the Appeal may be allowed and the preliminary decree reversed. Secondly, the Appeal may be dismissed and the preliminary decree confirmed in toto. and thirdly, there may be modification of the preliminary decree in Appeal and this modification may be one of two kinds: (i) the amount decreed may be increased, or (ii) the amount decreed may be reduced.

Even where there has been a variation in the decree, the final decree, if passed in the meantime, requires no formal amendment in view of the form in which a final decree for sale is prepared. All that happens is that where the preliminary decree is varied one way or the other, the final decree which is entirely depending on the preliminary decree stands varied by its own terms in accordance with the terms of the preliminary decree passed in Appeal. It is the duty of the executing Court when it is executing the final decree passed in the meantime to see that the execution is in accordance with the preliminary decree passed in Appeal which is the support of the final decree. The only exception to this principle is a case where the Appellate Court gives specific direction for the preparation of a fresh preliminary decree or gives further time after the decree in Appeal from the preliminary decree. In such a case a fresh preliminary decree may have to be drawn up to be followed by a fresh final decree. But where there are no specific direction of the Appellate Court with respect to the preparation of a new preliminary decree, and all that the Appellate Court orders is merely a variation in the amount for redemption be it more or less than that provided in the preliminary -- all that is required is that the executing Court should in executing the final decree prepared in the meantime give effect to the variation and no fresh final decree is necessary.

Therefore, it is seen from the above judgment, there is no need to pass a final decree on the basis of the modified preliminary decree passed in the First Appeal in the circumstances stated in that judgment.

9. Following the judgment of the Hon'ble Supreme Court referred to above, in my opinion, there is no need to pass a fresh final decree on the basis of the modified preliminary decree as per the order passed in the judgment A.S. No. 103 of 1994 and the lower Court has correctly held that the Execution application filed by the Respondents for decree is valid in law.

10. Hence, I do not find any reason to interfere with the order of the lower Court. Accordingly, this Civil Revision Petition is dismissed. Consequently, connected Miscellaneous Petitions are closed. No costs.