

(1918) 12 MAD CK 0002
In the Madras High Court

Sivasubramania Mudamar and Others	APPELLANT
Vs	
R.S.A. Lakshmanaier and Others	RESPONDENT

Date of Decision : 12-12-1918

Acts Referred:

Citation : 52 Ind. Cas. 697

Hon'ble Judges : Oldfield, J;Abdur Rahim, J

Bench : Division Bench

Judgement

1. A preliminary objection is taken by Mr. K. Srinivasa Aiyangar to the effect that the appeal being Bled against the preliminary decree alone while before the presentation of the appeal a final decree had also been passed, it is unsustainable. The question is covered by a number of decisions of this Court It, was first considered in Lakshmi v. Marudeni 12 Ind. Cas. 664 and it was ruled that, under such circumstances, an appeal against a preliminary order would be sustainable in spite of the fact that a final order had been passed in pursuance of the preliminary order. This ruling was followed in Ramien v. Veerappudian 14 Ind. Cas. 394: (1912) M.W.N. 117 Kuppusamy Aiyar v. Regmah Boi Ammani 18 Ind. Cas. 730 : (1913) M.W.N. 173 and Cuniah Mudaly v. Rangoswamy Mudaly 48 Ind. Cas 7 No doubt there is a decision Subromania Chettiar v. Balachakropani Chettyar (1913) M.W.N. 140 which, so far as it goes, seems to take a somewhat different view. That is a decision of Sundara Aiyar and Sadasiva Aiyar, JJ. There the learned Judges do not discuss the previous decisions, though to the ruling in Lakshmi v. Marudevi 12 Ind. Cas. 664 : 10 M.L.T. 437 Mr. Justice Sundara Aiyar was himself a party. The same view of the law was taken in the Allahabad High Court in

Konhaiya Lal v. Turbeni Sahai 21 Ind Cas 827, where a Full Bench decided, overruling some of the previous Division Bench rulings, that the fact that a final decree had been passed does not in any way affect the validity of an appeal against the preliminary decree. We think that the reasoning in Kuppusamy Aiyar v. Regmuh Boi Ammoni (1913) M.W.N. 173 and that in Kanhaiya Lal v. Tribeni Sahai 21 Ind Cas 827 is based upon a correct view of the provisions of Section 97 of the civil Procedure Code, which requires that an appeal must be filed from the preliminary decree, that otherwise its correctness cannot be disputed afterwards in the appeal preferred from the final decree. It can hardly be said that the final decree is that which follows the preliminary decree. It is not like the decree of an Appellate Court superseding the decree of the lower Court which it reverses. A different view has prevailed in Khirodamoyi Dasi v. Arthur Chandra Ghose 21 Ind. Cas. 516, Sadhu Charan Datta v. Hara Nath Datta 27 Ind. Cas. 135 and Mackenzie v. Narsing Sahai 1 Ind. Cas. 413 and also apparently in Dattatraya Ramachandra v. Ajmuddin Fakruddin 33 Ind. Cas. 146. There may be cases such as in Khirodamoyi Dasi v. Adhar Chandra Ghose 18 C.L.J. 321, where the final decree altogether dismisses the suit for non-prosecution; then different considerations may possibly arise. But so far as the present question is concerned, that is where the final decree is in accordance with the preliminary decree and does not in any way supersede it or modify it, supposing that is allowable, we think the weight of reasoning is in favour of the view which has almost unanimously prevailed in this Court. The preliminary objection will, therefore, be over-ruled.

2. We do not think that there is any substance in any of the arguments urged in this appeal against the decree of the learned Subordinate Judge.

The most important question is whether there were separate payments of rent amounting to about Rs. 10,000 in addition to those entered in

Schedule F to the plaint. The Subordinate Judge finds, we think quite rightly, that there is really no evidence worth considering in support of the

defence allegation that there were payments amounting to Rs. 10,000 over and above those for which the plaintiffs have given credit in their plaint.

No receipt or vouchers were produced by the defendants nor any accounts, and the only documentary evidence with respect to payments is that

furnished by the plaintiffs" accounts and the entries made on Exhibit A on the 22nd April 1914. The evidence on the side of the defence consists

merely of very general statements of two of the defendants. They are not even able to specify the dates or the amounts of the different payments, if

there were any such. There can be no doubt whatever that the finding of the Subordinate Judge on this point is correct, namely that there were no

payments other than those with which the defendants have been credited.

3. That being found against the defendants, there is hardly any substance in the question raised regarding appropriation whether certain payments

which were entered on Exhibit A were made towards the rent due on the lands covered by Exhibit B, that is, the usufructuary mortgage. The

evidence on this point on the plaintiffs" side seems to be more reliable than that on the side of the defendants. The case of the plaintiffs is that all

these payments, including those in question, were entered on Exhibit A, because the defendants had agreed to execute a mortgage for the bulk of

the amount due on that date, that is Rs. 50,000, and the plaintiffs agreed to release some of the lands included in Exhibit A from encumbrances. It

was on condition that such a document would be executed that all the payments were entered on Exhibit A. This story seems to be corroborated

by Exhibit M, a letter written by 1st plaintiff to 2nd plaintiff, and accords more with the probabilities of the case than the version of the defendants.

The payments, though covering several years, were all made on one date. The defendants tried to make out that the entries in question were made

for the purpose of appropriating the payments towards the discharge of Exhibit A itself and none of the payments were with respect to Exhibit B

for rent, which according to them had been paid separately. They being unable to prove any such separate payments, their version fails. Nor can

the evidence in support of this story be said to be satisfactory. The Subordinate Judge, we think, has also rightly found this issue in favour of the

plaintiffs.

4. As regards interest, it has been rightly held by the trial Judge that the alleged agreement not being registered could not be used to prove that the

rate of interest mentioned in the mortgage-deed was not the rate which the defendants are liable to pay. The learned Vakil for the appellants tried

to argue that there had been a remission of the higher rate of interest, but no

such case was put forward in the lower Court and cannot, therefore, be entertained in the appeal for the first time.

5. The last objection urged before us is with respect to Exhibit C, the last of the mortgages for Rs. 8,000 intended for the benefit of the 4th plaintiff.

But we think that the Subordinate Judge has correctly found that it was executed in his name for the benefit of plaintiffs Nos. 1 to 3 as well as himself.

6. It was then argued that the rent for the And u-year 1086 was barred. This would be so but for the acknowledgment alleged to be contained in

Exhibit E. We have no doubt that Exhibit E, though couched in general terms amounts in law to an acknowledgment. And it is also clear that the

22nd defendant in writing acted on behalf of the entire family, that is, defendants Nos. 1 to 6.

7. In the result the appeal is dismissed with costs of the respondents Nos. 1 to 4.