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**(1969) 12 MAD CK 0029**

**In the Madras High Court**

Thava Pandian and Others — APPELLANT

Vs

Veerappa Chettiar and Others — RESPONDENT

**Date of Decision :** 08-12-1969

**Acts Referred:**
Civil Procedure Code, 1908 (CPC) — Order 34 Rule 5

**Citation :** (1971) ILR (Mad) 779 : (1970) 83 LW 512 : (1970) 2 MLJ 625

**Hon'ble Judges :** K. Veeraswami, C.J

**Bench :** Division Bench

## Judgement

K. Veeraswami, C.J.—The question in this appeal is whether an execution sale can. be set aside on the ground that it was in variance with the priority of sales settled by the preliminary decree which was not embodied in the final decree in a mortgage action. The execution Court as well as Kailasam, J., have taken the view that the sale is not vitiated on that ground. We are in agreement with this conclusion.

2. The execution related to a decree obtained on the foot of a third mortgage dated 3rd November, 1924. The preliminary decree in O.S. No. 68 of 1931 was passed on 10th December, 1934, and the final decree followed on 17th August, 1938. The hypotheca consisted of several schedules with reference to which, so far as the present appeal is concerned, lots 2 and 3 in the C schedule were directed by the preliminary decree to be sold last. On 18th June, 1935, the petitioners in the execution Court, of whom the present appellants are the legal representatives, purchased from the mortgagors the equity of redemption in the properties covered by lots 2 and 3 in the C schedule, apparently in view of the stipulation in the preliminary decree just mentioned as to the order of sales. There had been several execution petitions resulting in execution sales of properties included in the C schedule and other schedules. So far as lots 2 and 3 in the C schedule were concerned, they were sold on 4th February, 1952, in execution. The petitioners in the execution Court filed E.A. No. 93 of 1952 to set aside that sale on the ground that it was contrary to the terms of the preliminary

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decree. This ground was accepted by the District Judge. But, on appeal, it was reversed on the view that the question of res judicata should have been gone into. On remittal, the District Judge, again dismissed the petition. He thought that the petitioners were precluded from raising the objection because they had not raised it in earlier stages of the execution. The matter once again came up to this Court in. appeal which was allowed on the view that it was necessary to find, in order to see if the directions in the preliminary decree had been complied with, how much money could be realised by the decreeholder from the B schedule properties. The petition shared the same fate as before in the execution Court over again, which held that the point was barred by res judicata. With this view, Kailasam, J., concurred. That is how the Letters Patent Appeal comes before us.

3. It has been pressed upon us for the appellants that the final decree is based upon the terms of the preliminary decree by reference and that due to this dependency of the final decree on the preliminary decree, the latter must be taken to have carried with it the stipulations in the preliminary decree as to the priorities in the conduct of execution sale. Reference was made to Order 34, Rule 5 and the forms prescribed by the Code for the preliminary and final decrees, and it was contended that if the priority settled by the preliminary decree was not followed in execution, the resulting sale would be invalid. In our view, the contention is not correct. The principle of dependency can be applied only in cases of variation of the preliminary decree and cannot be extended to a case like this. Where pending execution of the final decree in a mortgage action the preliminary decree is varied in appeal either in respect of the extent or liability of the hypotheca or of the amount due under the mortgage or a like matter, that would have to be read into the final decree even without the latter being correspondingly amended. The cases cited for the appellants are all cases of that type.

4. In Sital Parshad Vs. Kishorilal, , the Supreme Court pointed out the duties of the Court executing a final decree when there was an appeal pending against a preliminary decree and as a result the preliminary decree has been varied. In that case when varying the preliminary decree under appeal, the. Court failed to direct preparation of a fresh final decree. Even so, the Supreme Court held that the executing Court should give effect to the variation even without a fresh final decree. In fact it was pointed out that in such a case fresh final decree was (not) necessary. The Supreme Court said:

It will be seen from this form of the final decree (hat it is entirely dependent upon the preliminary decree. Therefore, where the preliminary decree has been confirmed in toto and the appeal therefrom has been dismissed, there is no change whatever to be made in the final decree, for that decree already provides for subsequent interest after the date of the preliminary decree and for subsequent costs, charges and expenses. Therefore, in such circumstances if the final decree has already been prepared before the judgment in appeal from the preliminary decree, there is nothing more to be done and the final decree as it

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stands needs no amendment. But if the decree-holder does not wish to await the result of the appeal from the preliminary decree he can ask for a final decree in the meantime, and if the preliminary decree is confirmed in toto the final decree will need no change and can be executed as it stands. We are further of opinion that 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 sec that the execution is in accordance with the preliminary decree passed in appeal which is the support of the final decree.

Goli Paddaraju and Others Vs. Mattapalli Raju and Another, and Venkatasubba Rao v. Kesavayya (1955) An.W.R. 492, are cases of variation of the preliminary decree by the appellate Court and viewed the question in the same way as Sital Parshad Vs. Kishorilal, . In our opinion, the principle applicable to variation of a preliminary decree in the context cannot be extended to cases where the terms of the preliminary decree as to priority of sales had not been carried into the final decree and execution has taken place in accordance with the final decree as it stands. The doctrine of dependence does not enable the Court to read the preliminary decree and the final decree together and proceed on the basis that the final decree reflected the terms of the preliminary decree unless on a construction of the two decrees that view would be justified. Apart from construction we do not think that normally omission in the final decree of the terms in the preliminary decree can be taken note of by the executing Court and try to set it right. The executing Court should take the final decree as it stands and cannot go behind it. Whether particular items of property should be sold first or last, as indicated in the preliminary decree, is part of the decree and it is not a question relating to execution, discharge, or satisfaction of the decree. If the final decree is in variance with the preliminary decree, the right course for the party is to apply for amendment of the final decree and not to ask the executing Court to sit in judgment over the final decree. The case nearest to the facts of the case before us in Parmeshwar Dayal Amist and Others Vs. Rambrichh Singh and Others, . In that case preliminary decree was passed with a direction that 14 dams out of the mortgaged 1 anna share in the hypotheca should be first sold free from encumbrance and in case the sale proceeds were found to be insufficient then the remaining 6 dams should be sold subject to the prior encumbrance. This direction was not carried into the final decree which was executed as it was. The priority settled in the preliminary decree having not been followed, the sale in execution was questioned but unsuccessfully. The Court, in declining to set aside the sale, observed:

Indeed the question of priority of the mortgage in respect of 6 dams was declared by the preliminary decree, but for some reason or other, in all likelihood

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by mistake, the direction with regard to the prior mortgage was omitted from the final decree. A Court in passing a final decree under Order 34, Rule 5, Civil Procedure Code, has to follow the terms of the preliminary decree. If however the Court passes a final decree in variance with the terms of the preliminary decree, the Court, when executing the decree will execute the final decree as it stands. It is of course open to the executing Court to interpret the final decree in the light of the preliminary decree. But where no objection is taken to the passing of the final decree in variance with the terms of the preliminary decree or to the execution of such final decree and in execution the mortgaged property is sold and the sale is confirmed the judgment debtor will not be heard to say that the final decree or the execution sale is not binding on him or does not affect his rights under the preliminary decree.

5. We agree with this view. It does not appear that any objection to the passing of the final decree in the form in which it was executed was made by or on behalf of the 6th defendant from whom the appellants derive title. The decree as it was had been put in execution at least twice before the present : execution out of which the appeal arises, and at no time any objection was raised by that defendant. Kailasam, J., has referred to this aspect and found that he would be precluded from even raising the question of validity of the sale on the ground that the final decree was in variance with the preliminary decree in respect of the order of priority of sales. In fact, the learned Judge has even found, and we accept the finding, that the sixth defendant acquiesced in the execution of the final decree as it stood.

6. We, therefore, decline to interfere and dismiss the appeal with costs.

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