

**Goli Paddaraju and ors. Vs. Mattapalli Raju and anr.**

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**Court :** Chennai

**Decided On :** Mar-22-1950

**Reported in :** AIR1951Mad381; (1950)2MLJ537

**Judge :** Subba Rao and ;Panchapakesa Ayyar, JJ.

**Acts :** [Code of Civil Procedure \(CPC\), 1908](#) - Order 34, Rule 5

**Appeal No. :** A.A.O. No. 174 of 1946

**Appellant :** Goli Paddaraju and ors.

**Respondent :** Mattapalli Raju and anr.

**Advocate for Def. :** G. Balaparameswari Rao, Adv.

**Advocate for Pet/Ap. :** V. Parthasarathy, Adv.

**Disposition :** Appeal dismissed

**Judgement :**

Subba Rao, J.

1. 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 v. Kishan Jiwan Lal* : AIR1917All163 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 v. Deonandan Prasad Singh*, 6 Pat. 780 : : AIR1927Pat215 ), 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 *Jankidas v. Sheoprasad* : AIR1932All238 , 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 *Talebali v. Abdul Aziz* : AIR1929Cal689 , 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.

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