ANDHRA PRADESH HIGH COURT

Gandavarapu Venkata Subba Rao

Vs.

Vavilala Kesavayya

A.A.A.O. No. 73 of 1954

(Subba Rao, C.J.)

26.04.1954. 09.03.1955

JUDGMENT

Subba Rao, C.J.

1. This is a judgment-debtor's appeal against the order of the District Judge, Guntur in C.M.A. No.20 of 1953 confirming that of the District Munsif in Execution Petition No.153 of 1952.

2. The respondent instituted O.S. No, 194 of 1950 in the Court of the Subordinate Judge, Guntur to enforce the mortgage deed executed by the appellant. He obtained a preliminary decree on 1-9-1951. In due course, a final decree was made on 16-7-1952. The defendant filed an appeal in respect of a portion of the decree amount and the plaintiff filed cross-objections against that part of the decree disallowing interest. On 25-3-1953, the District Court dismissed the appeal filed by the defendant and allowed the cross-objections of the plaintiff. Meanwhile on 26-7-1952, the decree-holder filed Execution Petition No.153 of 1952 for realising the decree amount by sale of hypotheca. The sale was held on 10-8-1953 and the hypotheca was sold for Rs. 4,060/-. It may be mentioned at this stage that the preliminary decree was for the recovery of Rs. 5,000/-. By reason of the decree made by the appellate Court on 25-3-1953, the defendant had to pay another sum of Rs. 332-5-2 and also the costs of the appeal. After the appellate decree, neither the final decree was amended nor was the correct figure included in the execution petition.

3. The judgment-debtor contended in the courts below that the final decree was a dependent decree and as the preliminary decree on which it was based was varied by the appellate Court, unless a fresh final decree was made or the existing decree amended, so as to bring it in conformity with the appellate decree, the original decree could not be executed, and, therefore, the sale held pursuant thereto was void. This contention was negatived by both the courts. The judgment-debtor also raised before the lower court the plea that the reduction of the upset price from Rs. 18,000/- to Rs. 4,000/- was wrong. The learned District Judge held, agreeing with the court below that the sale was valid. Hence the appeal.

4. Mr. Ramachandraiah, learned counsel for the appellant relies upon the two points which his client unsuccesfully raised in the courts below.

5. Taking the second point first, some of the relevant facts may be stated. The suit property is a house in Guntur. It is subject to a mortgage of Rs. 18,000/-. It was fetching a monthly rental of Rs. 90/-. If the portion occupied by the Judgment-debtor was also let out, it might have fetched another sum of Rs. 25/- per month. In the first instance, the learned Subordinate Judge fixed the upset price at Rs. 15,000/- but there were no bidders. Having regard to the aforesaid facts, he reduced the upset price to Rs. 4,000/- subject to the prior mortgage. The learned District Judge also accepted, in the circumstances, that the reduction of the upset price was correct. There are, therefore, no permissible grounds for interference in a Civil Miscellaneous Second Appeal with the discretion exercised by the Subordinate Judge, having regard to all the facts placed before him and particularly when his conclusion was accepted by the appellate court.

6. The first point of the learned counsel may be put thus : The final decree is a dependent decree, depending for its validity on the preliminary decree. When the preliminary decree was superseded by the appellate decree, unless the final decree is suitably amended to bring it in conformity with the appellate decree or a fresh final decree is made, the hypotheca cannot be brought to sale. As in this case, the property was sold pursuant to the final decree, which lost its legal force, the sale held in execution of that decree was void. This argument was subject to judicial scrutiny resulting in a conflict of views. It is, therefore, convenient at this stage to consider the cases cited at the Bar.

7. In - *'Subbarayulu Nayudu v. Sundararaja Naidu*[1]*',* Abdur Rahim and Oldfield, JJ., held that an application for a final decree for sale under Order 34, Rule 5(2), C.P.C., is governed by Article 181 of Limitation Act, and where there has been an appeal from the preliminary decree, time begins to run from the date of the decree on appeal, even though the appellate decree merely confirms the decree of the first court. The reason for the decision was expressed in the following terms at page 938 :

> "There having been an appeal and a decree of the appellate court, it is that decree which is to be enforced. The appellate decree, ordinarily speaking, must be taken to supersede the decree of the first court."

The said proposition is unexceptionable.

8. Krishnan Pandalai, J.: in - *'Ramaswamy Ayyar v. Pakkiri Pathar*[2]*',* had to consider the question whether the decree-holder had a right to apply for a fresh final decree after the preliminary decree was confirmed by the appellate Court. Where, there was a final decree pending an appeal filed against the preliminary decree. The appellate court on a judicial determination confirmed the preliminary decree and dismissed the appeal. The learned Judges held that the decree-holder had the right which he might exercise within three years from the date of the decree to obtain a final decree in

[1] AIR 1919 Mad 938
[2] AIR 1934 Mad 65

conformity with the appreciate decision, or if that isthe proper way of expressing it, amending the old final decree so as to bring it into such conformity. At page 66 the learned Judge made the following observation:

> "Far from it being the case that an application for a second final decree is illegal, the true doctrine is that the right to ask tor a final decree arises where the preliminary decree has been under appeal from the date of the judgment in appeal. In cases where there has been a final decree in pursuance of the preliminary decree of the lower court pending the appeal, that final decree is valid and binding to the extent, but only to the extent to which it is not altered by the appellate decree, and a decree of the appellate court confirming after judicial consideration, the preliminary decree of a lower court is for this purpose one altering it".

According to this decision, a decree-holder has a right to apply for a fresh final decree or to get that decree amended suitably within three years from the date of the appellate decree. This view did not find favor with the later Bench decisions.

9. A Division Bench of the Madras High Court consisting of Krishnaswamy Ayyangar and Kunhi Raman, JJ., in - *'Balakrishnayya v. Linga Rao*[3]*',* made observations, though obiter much to the same effect as follows at page 450:

> "It is difficult to maintain the proposition that the decree of the High Court can be regarded as a final decree capable of execution. The correct view in a case where an appeal has been preferred from the preliminary decree is, as held in - *Gajadhar Singh v. Kishen Jiwanlal*[4]*',* that the decree passed by the appellate court should be deemed to be the preliminary decree which has to be made final under Order 34, Rule 5, C.P.C., before it can be regarded as executable. It is not necessary for the present purpose to consider whether the right course for the decree-holder is to apply for a fresh final decree or to have the final decree already passed suitably amended by incorporating the modifications as he had done neither".

10. The learned Judges did not pursue further this line of reasoning as they disposed of the case on the question of res judicata. But another Division Bench of the same High Court in - *'Periakaruppan v. Venugopal*[5]*',* directly tackled this problem and expressed a definite opinion on the same. There a preliminary mortgage decree was passed on 4-5-1929. An appeal was filed 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 23-9-1933, on the basis of the preliminary decree passed on 4-5-1929. On 26-11-1934, the appeal was allowed in part which had the effect of reducing the decree amount. 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 23-9-1936 to execute the final decree passed on 23-9-1933, again another execution in 1939 and finally another on 31st March 1942. Along with the last execution petition he filed an application for amendment of the execution

[3] AIR 1943 Mad 449 [5] AIR 1946 Mad 383

[4] AIR 1917 All163 (SB)

petition by substituting the amount awarded by the appellate decree in place of the amount awarded by the final decree dated 23-9-1933. The District judge allowed the application for amendment and adjourned the execution petition for further steps.

11. It will be seen from the aforesaid facts that the only distinguishing features of that case from the present were that the execution application was filed after the appeal against the preliminary decree was disposed of, that the sale had not been held at the time the objections were taken, that the correct figure was embodied by way of amendment in the execution application and that the application for execution was filed three years after the appellate decree. But as in the present case, neither a fresh final decree was made nor was the final decree amended, so as to bring it in conformity with the appellate decree. The learned Judges held that the final decree was capable of execution. At page 386 Rajamannar, J., (as he then was) gave the reason for his decision as follows:

> '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 fact, the words "preliminary decree passed in this suit" which occur in any final decree for sale ought to be understood to mean the preliminary decree as affected by any appellate decision in cases where the preliminary decree is the subject of an appeal. So read, we do not see any difficulty in holding that whether the preliminary decree is affirmed to or is varied to any extent or in any particular the final decree could be executed, with such modifications as may be necessary in the circumstances, which might as well be made in the execution petition filed after the appellate decree." The learned Judge proceeded to state:

> "We do not think that so long as the decree itself has been kept alive, there can be the bar of limitation to an application of this sort. Such application really calls upon the court to carry out modifications which in law automatically take place in the final decree already passed before the decree of the appellate court.....This clearly suggests that there is nothing in the Code which makes it incumbent on a decree-holder to make an application which would be governed by Article 181 of Sch. I to the limitation Act to obtain any fresh relief".

Apart from the fact that I respectfully agree with the observations in this decision, being of a Division Bench, is binding on me. This decision lays down that a decree made by an appellate court automatically operates on the final decree and so long as the execution of the final decree is not barred by limitation, proper amendments can be made even in the execution application. The final decree, despite the fact that the preliminary decree was modified, continues to have legal force and remains executable as such.

12. Another Division Bench of the Madras High Court, of which I was a member, considered the aforesaid decision and followed the same in - *'Paddaraju v. Mattapalli Raju*[6]*',* In that case, sale was held in execution of a final decree in a mortgage suit. Thereafter, on appeal the preliminary decree was modified by the appellate court-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 the defendants 3 and

15 should be sold last. With this modification, the appeal was dismissed. It was contended before us that the sale was void, as it was held in execution of a final decree made pursuant to a preliminary decree, which was subsequently varied by the appellate Court. We repelled the contention following the decision in AIR 1946 Madras 383. In - *'Kunjammal v. Krishna Chettiar[7]',* Rajamannar, Chief Justice and Venkatarama Ayyar, J., held that when a decree is taken in appeal to a higher court, the decree passed in appeal supersedes that of the court below and becomes a decree in the suit itself, and thereafter it is the only decree which is capable of execution and that the period of limitation for execution would run from the date of the decree. No exception can be taken to this proposition, for it is a wellsettled principle that an appellate decree supersedes the decree of the original court.

13. A Division Bench of the Allahabad High Court in - *'Ram Nath v. Deoki Nandan Krishna[8]',* took a different view from that of the Madras High Court. There, the learned Judges held that the preliminary decree passed by the trial court having been varied by the appellate court, the final decree fell to the ground and it could not be executed until it was made consistent with the preliminary decree passed by the appellate court or a fresh final decree was prepared in accordance with it, and that the application made by the decree-holder that the said decree be amended, so as to bring it in accordance with the decree passed by the appellate court, having been made after lapse of three years, was barred by Article 181 of the Limitation Act. I would prefer to follow the Madras view to the Allahabad view.

14. From the aforesaid discussion of the case-law, the law on the subject may be summarized thus: The appellate decree supersedes the original decree. Whether the appellate decree modifies, confirms or reverses the first court decree, the appellate decree is the only enforceable decree. As the final decree only carries out the directions given in the preliminary decree, the appellate decree automatically operates on the final decree passed pursuant to the original preliminary decree. So long as the final decree is kept alive, it is the duty of the court to incorporate the amendments in the final decree. The decree-holder also may bring to its notice the modifications made by the appellate court in execution or by a separate application. No limitation is prescribed for such an application, for by that application the decree-holder only asks the court to make express what has already been automatically incorporated in the final decree. The final decree, therefore, even after the preliminary decree was varied by appellate decree continues to have legal force and validity. The sale held in execution of that decree is not void. But difficulties might arise where a property was sold in execution of a finial decree and thereafter the entire basis of the preliminary decree was disturbed. Such sales perhaps may be set aside on the ground, not because

[6] AIR 1951 Mad 381 [8] AIR 1947 All 83
[7] AIR 1954 Mad 170

they were void, but because there was a material irregularity and the judgment-debtor sustained substantial injury by reason of that irregularity. But in a case where the sale would have been held even if the modifications made by the appellate decree were incorporated in the final decree, there is no reason why the sales should be set aside at all. In a case where the preliminary decree was modified by the appellate Court before the sale was held, the modifications must be deemed to have been automatically incorporated in the final decree, and therefore the sale held in execution thereof would certainly be valid. But even in such cases, where the property is sold for a large amount on the basis of the final decree, though as a matter of fact, by reason of the

appellate decree, the amount has been substantially reduced, the courts might set aside the sale on the ground of an irregularity in an application filed by the party affected by the sale, if he had no knowledge of such reduction. But where the property would have been sold even after the amendments were incorporated in the decree, there will be no reason or justification for setting aside the sale on the technical ground that the decree amount would be different if the amendments were incorporated in the decree.

15. In the present case, by the appellate decree, an additional amount representing interests and costs were added to the decree amount. It cannot be suggested that the properties now in question would not have been sold if those amounts were also incorporated in the decree. The sale proceeds did not even cover the amount shown in the original preliminary decree. In the circumstances, there are no grounds for setting aside the sale.

16. In the result, the appeal fails and is dismissed with costs. No leave.

Appeal dismissed.