PETITIONER:
SITAL PARSHAD

Vs.

RESPONDENT:
KISHORILAL

DATE OF JUDGMENT:
06/03/1967

BENCH:
WANCHOO, K.N.
BENCH:
WANCHOO, K.N.
BACHAWAT, R.S.
RAMASWAMI, V.

CITATION:
1967 AIR 1236 1967 SCR (3) 101

ACT:
Code of Civil procedure, 1908 (Act 5 of 1908) O. XXXIV-Preliary decree made final while appeal pending-Variation in appeal.

HEADNOTE:
The respondent obtained a preliminary decree in 1952 against the appellant for the sale of the mortgaged property. He appealed to the Court for interest and costs which was not allowed in the prelitry decree. The appellants did not appeal against the preliminary fee. On respondent's application, the preliminary decree was made in 1954. While execution proceedings were pending, the respondent's appeal was allowed in 1956 in respect of the interest and costs. 960 the appellant objected under s. 47 C.P.C., that as no final fee. had been prayed for and passed after the judgment of the High court in appeal and as more than three years had passed since the judgment of the High Court, there was no final decree to be executed, as decree which had been prepared in 1954 on the basis of which union was going on must be held to have no force and effect after judgment of the High Court making a variance in the preliminary ee. The respondent contended that it was not necessary to a apply a fresh final decree after the judgment of the High Court in appeal that the final decree already passed in 1954 remained good and was suitable. The appellant's objection was rejected. In appeal, this it.
HELD : The appeal must fail.
Where a preliminary . decree has been reversed in appeal, the final fee must fall to the ground for there is no preliminary decree therein support of it. It is not necessary in such a case for the defendant to go to the court passing the final decree and ask it to set aside final decree. If an execution petition is made on such a final decree though more than three years after the decree in appeal has been raised, the defendant has simply to ask the court where the execution ton is made to refuse to execute the decree on the ground that the minary decree in support of it has been set aside. In such a case the duty of the executing court to take note of the fact that the minary decree in support of the final decree has been reversed and

could refuse to execute the final decree even though the fact is right to its notice more than three years after the decree in appeal repairing the preliminary decree and no question of limitation arises.
G-107 C]
Where the decree in appeal from the preliminary decree confirms it into, the final decree already passed needs no change and must contend to stand. It is true that if no final decree has been passed before appeal from the preliminary decree is decided, the decree-holder gets years from the date of the decree in appeal from the preliminary fee to apply for a final decree. That however is a question of limitation and in such a case three years run from the date of the decree in final from the preliminary decree in order apparently not to compel older to apply for a final decree if he does not wish to do
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so and wants to await the result of the appeal from the preliminary decree. 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 mean time and if the preliminary decree is confirmed in toto the final decree will need no change and can be executed as it stands. the decree holder in such a case need not apply for a fresh final decree and can execute the final decree already passed in the meantime. In all cases where a final decree has been passed in the meantime while an appeal from the preliminary decree, is pending, the existence of the final decree ought to be brought to the notice of the appellate court and it is the duty of the appellate court to give directions with respect to the final decree if it considers necessary. Further in a case where an appeal from the preliminary decree is dismissed and the preliminary decree is confirmed in toto, it does not follow that the period of payment allowed in the trial court's decree is extended automatically even though a final decree has been passed in the meantime. It is the duty of the -appellate court to indicate, when dismissing the appeal from a preliminary decree in toto, whether the time for payment is to be extended and if it does not do so, the original time granted for the purpose must stand. where the appellate court, in an appeal from a preliminary decree,, says nothing about the time fixed for payment and confirms the preliminary decree In toto that time stands and does not automatically get extended for six months or such other period as might have been fixed in the preliminary decree from the date of the decree in appeal from the preliminary decree It is not obligatory on a court of appeal to fix a fresh date for redemption in a mortgagor's appeal from a mortgage decree for sale even where there is some variation in the amount payable under the preliminary decree. [110 B-111 C]
Where the amount decreed is increased, as in the present case, matter stands on exactly the same footing as in the case where the appeal from the preliminary decree by the defendant is dismissed in toto Where variation is in favour of the defendant and the amount fixed for redemption is reduced, it is the duty of the appellate court when it is reducing the amount payable for redemption to fix some time for the purpose in the interest of justice. But it is not bound to do so and it does not do so, the original time fixed in the preliminary decree stands even though the amount for redemption may have been reduced. There is no harm to the defendant mortgagor in such a case, for, under O XXXIV r. 5(1) the mortgagor would have time up to the date confirmation of sale to deposit the amount and save the

property. (111D-G]
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 in that where the preliminary decree is varied one way or the other, the final decree which is entirely dependent 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. Of course, if the appellate court when deciding the appeal gives any particular direction with respect to the preparation of a fresh preliminary decree that direction has to be carried out. Where there are. no specific directions of the appel-late court with respect to the preparation of it new preliminary decree, and all that the appellate court orders is merely a variation in the amount for redemption, it is duty of the executing court to see when it .is asked to execute a final decree prepared in the meantime that the
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modifications made by the appellate court in the appeal from the preliminary decree are given effect to during the execution proceeding% [111 H-112 E]
in the circumstances of the present case it was the duty of the Executing court, when variations made by the appellate court in appeal form 6 and all that the executing court had to do was to take note of account in executing the final decree.' which had been prepared in the meantime. The final decree in terms required no change in view of from the preliminary decree were brought to its notice, to take them into the fact that the supporting preliminary decree bad been varied and to execute the final decree in accordance therewith. [112 G-H]
Perikaruppan Chettiar v. Venugopal Pillal, I.L.R. [1947) Mad. 132; Rukhmabai v. Krishnarao, I.L.R. [1952] Nag. 243 and Gandavaraup Venkata Subba Rao v. Vavilal Kesavayya, A.I.R. [1955] A.P. 254; proved.
Ram Nath v. Deoki Nand Krishna, I.L.R. [1947] All. 40; Abdul Jalil v. Amar Chand Paul, (1913) XVIII Cal. L.J. 223 and Mewa Singh v. Tara Singh, A.I.R. [1933] Lab. 859; disapproved.
Muhammad Sulaiman Khan v. Muhammad Yar Khan, I.L.R. [1888] 11 All. 267; Jowad Hussain v. Gendan Singh, (1926) 53 I.A. 197 and Fitzholmes v. Bank of Upper India, (1926) 54 I A. 52; referred to.

JUDGMENT:
CIVIL APPELLATE JURISDICTION : Civil Appeal No. 855 of 1964.
Appeal from the judgment and order dated November 7, 1962 of the Punjab High Court in Letters Patent Appeal No. 334 of 1961.
Rameshwar Dial and A. D. Mathur, for the appellants.
B. C. Misra, M. V. Goswami and S. S. Shukla, for the res-pondent.
The Judgment of the Court was delivered by
Wanchoo, J. This is an appeal on a certificate granted by the High Court of Punjab and raises a question of law on which there is some difference of opinion amongst the High Courts. Brief Facts necessary for present purposes are these. The respondent obtained a preliminary decree in a

mortgage suit against the appellants on March 13, 1952. The decree was for sale of the mortgaged property. As the preliminary decree did not allow interest to the respondent from the date of the suit to the date of the preliminary decree, he filed an appeal to the High Court in that connection. The appellants (Judgment-debtors) were apparently content with the preliminary decree for they filed no appeal. As there was no stay order passed by the High Court, for the judgment-debtors had not appealed, the respondent applied for making the preliminary decree final and on August 16, 1954 the preliminary decree was made final under 0.XXXIV r. 5, of the Code of Civil Procedure. On August 18, 1954, the respondent took

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out execution of the final decree. On December 17, 1956, while the execution proceedings were pending, the respondent holder's appeal in the High Court was allowed and the High Court allowed interest to the respondent. On April 2, 1960, the appellants objected under s. 47 of the Code of Civil Procedure that as no final decree had been prayed for and passed after the judgment of the High Court in appeal and as more than three years had passed since the judgment of the High Court, there was no final decree to be executed, as the final decree which had been prepared on August 16, 1954 on the basis of which execution was going on must be held to have no force and effect after the judgment of the. High Court making a variance in the preliminary decree. The respondent however contended that it was not necessary to, apply for a fresh final decree after the judgment of the High Court in appeal and that the final decree already passed on August 16, 1954 remained good and was executable, The executing court rejected the contention of the appellants Thereupon the appellants went in appeal to the High Court and this appeal was dismissed by a learned Single Judge. Then the appellants came in Letters Patent Appeal which has also been dismissed. As however there was some difference of opinion amongst the High Courts on the question of law raised in the, appeal, a certificate was granted by the High Court; and that is, how the matter has come before us.

We may indicate the two main lines of decisions in this matter. The first, which is in favour of the appellants is represented by Rant Nath v. Deoki Nand Krishna(1). In that case a Preliminary decree was passed in a. suit on a mortgage. pending an Appeal from the preliminary decree, the final decree was passed. Thereafter the appeal was decided and the preliminary decree was modified and a fresh preliminary decree was directed to be Prepared which was done. The decree-holder never applied for the execution of the final decree which had been prepared earlier to bring it in conformity with the decree of the appeal court or for preparation of a fresh final decree latter however more than three years after the judgment in appeal the decree holder applied for amending the final decree so asked to bring it in accord with the preliminiary decree passed by the real court had been varied pared fell to the ground and could which had already been premade consistent with the priliminary not be executed until it was late court or a fresh final decree was prepared in accordance with it further ask the application for amendment was made more

(1) I.L.R.[1947] All 40.

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than three years after the judgment of the appeal court it was barred by art. 181 of the Limitation Act. .

The leading case on the other side is Perikaruppan Chettiar

v.Venugopal Pillai(1). 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 the 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 by 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 alteration 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.

The question before us in the present appeal therefore is which of these two views is correct. Before we consider this question we many state certain well-settled propositions with respect to preliminary and final decrees in mortgage suits and the effect of an appellate decree in general on the decree of the trial court. Generally speaking, the decree of the appellate court supersedes the decree of the trial court even when it confirms that decree and

(1) I.L.R. [1947] Mad. 132.

therefore it is well-settled that only the appellate court can amend the decree thereafter : [see Muhammad Sulaiman Khan v. Muhammad Yar Khan(1)]. It is equally well-settled that where an appeal has been taken from a preliminary mortgage decree and is decided, the time for preparation of final decree is three years from the date of the appellate decree even though the appellate court may not have extended the time for payment provided in the preliminary decree, where no final decree has been prepared in between : [see Jowad Hussain v. Gendan Singh (2) J. This applies even to a case where the decree of the appellate court is made more than three years after the time fixed for payment in the preliminary decree : [see Fitzholmes v. Bank of Upper India (3)]. Further it is well-settled that the mere fact that

there is an appeal from a preliminary decree does not oust the jurisdiction of the trial court to prepare a final decree even while the appeal is pending unless there is a stay order : [see Sat Prakash v. Bahal Rai (4)]. Even if a final decree has been passed and an appeal from a preliminary decree is not incompetent and it is not necessary for a party to appeal both from the preliminary decree and the final decree in order to maintain his appeal against the preliminary decree. In such a case where the preliminary decree is set aside the final decree is superseded whether the appeal is brought before or after the passing of the final decree : [see Talebali v. Abdul Aziz(5)]. Further it was observed in the last case that where an appellate court sets aside or varies a preliminary decree it can, and indeed could, give direction 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.

Let us now turn to the problem before us keeping in mind the propositions indicated above. Now in an appeal from a preliminary decree one of 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.

There can in our opinion be no doubt that if in appeal the preliminary decree is reversed, the final decree must fall to the ground for there is no preliminary decree thereafter in support of it. It is not necessary in such a case for the defendant to 'go to the court passing the final decree and ask it to set aside the final decree. Even if the defendant does not make an application to

(1) I.L.R. (1888) 11 All. 267.
(3) (1926) 54 I. A. 52,
(2) [1926] 53 I.A. 197.
(4) I.L.R. [1931] LXII All 283.
(5) I.L.R. [1930) LVII Cal. 1013.

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the court for setting aside the final decree within three years because the preliminary decree has been reversed, the decree-holder cannot get the right to execute the final decree which has no preliminary decree in support of it. If an execution petition is made on such a final decree even though more than three years after the decree in appeal has been reversed, the defendant has simply to ask the court where the execution petition is made to refuse to execute the decree on, the ground that the preliminary decree in support of it has been set aside. It seems to us that in such a case it is the duty of the executing court to take note of the fact that the preliminary decree in support of the final decree has been reversed and it should refuse to execute the final decree even though the fact is brought to its notice more than three years after the decree in appeal reversing the preliminary decree. In such a case in our opinion no question of limitation arises.

Now take the second case where the preliminary decree has been confirmed in toto and a final decree passed on such decree already exists. It is contended on behalf of the appellants that in such a case the decree-holder must apply for preparation of a final decree within three years of the judgement of the appellate court confirming the preliminary decree in toto. Reliance in this connection is

placed on an observation in the case of Fitzholmes(1) in these words :

> "The mortgagors were right in their objection that these decrees should not be enforced till six months had elapsed from the judgment of the High Court."

In that case the preliminary decree had given six months time for payment and this observation seems to suggest that where the preliminary decree is confirmed six months given therein begins from the date of the confirmation of the preliminary decree in appeal. With respect, the observation seems to be obiter for the point really in dispute in that case was whether a final decree could be asked for within three years of the judgment of the appellate court confirming the preliminary decree and it was held that it could be so asked for, even though the time fixed in the preliminary decree for redemption had not been extended. In that case no final decree had been passed in-between and no question arose as to what would be the effect of the decree passed in appeal from the preliminary decree on a final decree passed in the meantime. This observation in that case is therefore in our opinion of no help to the appellants in determining the question before us.

To determine this question we have to look to the provisions of 0. XXXIV of the Code of Civil Procedure providing for preli-

(1) [1926] 54 I.A. 52.

minary and final decrees. Preliminary decree in a suit for sale with which we are concerned in the present case is prepared under O. XXXIV r. 4 read with O. XXXIV r. 1. It provides (a) for an account to be taken of what was due to the plaintiff at the date of such decree for principal and interest on the mortgage, the costs of the suit, if any, awarded to him, and other costs, charges and expenses properly incurred by him upto that date in respect of his mortgage security, together with interest thereon, (b) for declaring the amount so due at that date, and (c) for directing that, if the defendant pays into court the amount so found or declared on or before such date as the court may fix within six months from the date on which the court confirms and countersigns the account taken under cl. (a) or from the date on which such amount is declared in court tinder cl. (b), as the case may be, and thereafter pays such amount as may be adjudged due in respect of subsequent costs, charges and expenses as provided in r.10,together with subsequent interest on such sums respectively as provided in r. 11, the plaintiff shall deliver up to the defendant or to such person as the defendant appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, retransfer the property to the defendant at his cost free from the mortgage and from all encumbrances, and shall also, if necessary, put the defendant in possession of the property. According to the rule, the decree shall further provide that in default of the payment by the defendant as directed the plaintiff shall be entitled to apply for a final decree directing that the mortgaged property or a sufficient part thereof be sold, and proceeds of the same (after deduction therefrom of the expenses of the sale) be paid into court and applied in payment of what has been found or declared under or by the preliminary decree due to the plaintiff, together with such amount as may have been adjudged due in respect of subsequent costs, charges, expenses and interest, and the balance, if any, be paid to the defendant or other

persons entitled to receive the same.
It wilt thus be seen that the preliminary decree in a suit for sale determines the amount due on the date thereof after accounting if necessary and directs the defendant to pay that amount together with interest and subsequent costs, charges and expenses as provided in rr. 10 and 11. Thus the preliminary decree is complete in itself and the amount due to the decree-holder right upto the time that the execution is complete is either provided therein or worked out from the directions contained therein.
Then follows the final decrees under 0. XXXIV r. 5 (3) with which we are concerned in the present case. That directs that where payment is not made on or before the date fixed in the preliminary decree the court shall on application made by the plaintiff in this behalf pass a final decree directing that the mortgaged
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property or a sufficient part thereof be sold, and that the proceeds of the sale be dealt with in the manner provided in sub-r. (1) of r. 4. Further under 0. XXXIV r. 5 (1) the defendant has a further right at any time before the confirmation of the sale made in pursuance of a final decree passed under sub-r. (3) of this rule, to pay the money in court, and if that is done the court has to make directions in accordance with this sub-rule.
It will be seen from these provisions that a final decree does not mention any amount and is merely based on the preliminary decree and in a sense carries out that decree. Form No. 6 of the final decree in the First Schedule, Appendix D also bears this out. It says that as the payment has not been made as directed by the preliminary decree, it is hereby ordered and decreed that the mortgaged property mentioned in the aforesaid preliminary decree or a sufficient part thereof be sold, and that for the purposes of such sate the plaintiff shall produce before the court or such officer as it appoints all documents in his possession or power relating to the mortgaged property. The final decree further directs as follows :-

> "And it is hereby further ordered and decreed that the money realised by such sale shall be paid into the court and shall be only applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the plaintiff under the aforesaid preliminary decree and under any further orders that may have been passed in this suit and in payment of any amount which the court may have adjudged due to the plaintiff for such costs of the suit including the costs of this application and such costs, charges and expenses as may be payable under r. 10, together with such subsequent interest as may be payable under r. 1 1 of 0. XXXIV of the First Schedule to the Code of Civil Procedure, 1908 and that the balance if any shall be paid to the defendant or other persons entitled to receive the same."

It will be seen from this form of the final decree that it is entirely dependent upon the preliminary decree. Therefore where the preliminary decree has been confirmed in toto and the appeal there form 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 stands needs no amendment. It is true that there is a general principle that a decree passed in appeal even where it confirms the trial court's
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decree supersedes that decree. But where we are dealing with a decree passed in appeal from a preliminary decree and the final decree has already been passed in the meantime, the decree of the appellate court on appeal from the preliminary decree only supersedes the preliminary decree; it cannot and does not supersede the final decree which was not taken in appeal. Therefore if the decree in appeal from the preliminary decree confirms it in toto, the final decree already passed needs no change and must continue to stand. It is true that if no final decree has been passed before the appeal from the preliminary decree is decided, the decree-holder gets three years from the date of the decree in appeal from the preliminary decree to apply for a final decree. That however is a question of limitation and courts have held that in such a case three years run from the date of the decree in appeal from the preliminary decree in order apparently not to compel the decree-holder to apply for a final decree if lie does not wish to do so and wants to await the result of the appeal from the preliminary decree. 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. The decree holder in such a case need not apply for a fresh final decree and can execute the final decree already passed in the meantime. In such cases where a final decree has been passed in the meantime while an appeal from the preliminary decree is pending, it is well to remember the observations of Rankin C. J. in Talabali's case(1) that the existence of the final decree ought to be brought to the notice of the appellate court in all cases and that it is the duty of the appellate court to give directions with respect to the final decree if it considers necessary.

Further we are of opinion that in a case where an appeal from the preliminary decree is dismissed and the preliminary decree is confirmed in toto, it does not follow that the period of payment allowed in the trial court's decree is extended automatically even though a final decree has been passed in the meantime. it seems to us that it is the duty Of the appellate court to indicate when dismissing the appeal from a preliminary decree in toto whether the time for payment is to be extended and if it does not do so, the original time granted for the purpose must stand. In the present case the decree passed in appeal from preliminary decree shows that after setting out the decree of the trial court, all that the appellate court did was to say that the preliminary decree passed by the trial court was amended to this extent that the plaintiff would also be entitled to interest at Rs. 6 per cent on the principal amount from the date of the suit till the date of the decree and

(1) I.L.R. [1930] LVII Cal. 1013.

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also gave the plaintiff costs of the appeal. There was no direction for preparation of any fresh preliminary decree; nor was there any direction of changing the period fixed in the preliminary decree for payment of the amount. Where therefore the appellate court in an appeal from a

preliminary decree says nothing about the time fixed for payment and confirms the preliminary decree in toto that time in our opinion stands and does not automatically get extended for six months or such other period as might have been fixed in the preliminary decree from the date of the decree in appeal from the preliminary decree. We agree with the view taken in Rukhmabai v. Krishnarao(1) that it is not obligatory on a court of appeal to fix a fresh date for redemption in a mortgagor's appeal from a mortgage decree for sale even where there is some variation in the amount payable under the preliminary decree.

Then we come to the third class of cases where there has been variation by the appellate court in appeal from the preliminary decree. This variation can be of two kinds; firstly, the amount fixed for redemption may be increased as happened in the present case, or secondly, it may be reduced. In the first case we are of opinion that the matter stands on exactly the same footing as in the case where the appeal from the preliminary decree by the defendant is dismissed in toto. However, in the second case, where variation is in favour of the defendant and the amount fixed for redemption is reduced, a question may arise whether the period for redemption can be said to have been extended for six months or such other time as may be provided in the preliminary decree under appeal but beginning from the date of the decree in appeal. In such a case we are of opinion that it is the duty of the appellate court when it is reducing the amount payable for redemption to fix some time for the purpose in the interest of justice. But it is not bound to do so and if it does not do so, the original time fixed in the preliminary decree stands even though the amount for redemption may have been reduced : [see Rikhmabai's case(1)]. Nor do we think that any serious harm is done to the defendant mortgagor in such a case for under 0. XXXIV r. 5(1), even though no fresh time may have been fixed by the appellate court whether the amount for redemption is reduced, the mortgagor-defendant would have time upto the date of the confirmation of sale to deposit the amount and save the property. In these circumstances we see no reason to distinguish even this case where variation results in reduction of the amount of redemption from the case where the decree of the appellate court affirms the preliminary decree in appeal in toto.

We are further of opinion that even where there has been a variation in the decree, the final decree, if passed in the meantime,

(1) I.L.R. [1952] Nag. 243.

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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. Of course, if the appellate court when deciding the appeal gives any particular direction with respect to the preparation of a fresh preliminary decree that direction has to be carried out. Ramnath's case(1) was of this latter kind. There the appellate court directed the preparation of a fresh preliminary decree in accordance with its judgment. In such a case it may be said that as there had to be a new

preliminary decree in accordance with the direction of the appellate court, a new final decree in accordance with the new preliminary decree might have to be prepared. But where there are no specific directions 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 decree-, it is in our opinion the duty of the executing court to see when it is asked to execute a final decree prepared in the meantime that the modifications made by the appellate court in the appeal from the preliminary decree are ,given effect to during the execution proceedings. As we have said already, the language of the final decree in form 6 is such that it requires no modification even though there might be modifications in the preliminary decree by the appellate court, and all that is required is that the executing court should in executing the final decree prepared in the meantime give effect to the decree in appeal from the preliminary decree, if it is a case of variation one way or the other. 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. The present however is not a case of this kind as already indicated, and in the circumstances it was the duty of the executing court, when variations made by the appellate court in appeal from the preliminary decree were brought to its notice, to take them into account in executing the final decree, which had been prepared in the meantime. The final decree in terms required no change in view of form 6 already referred to and all that the executing court had to do was to take note of the fact that the supporting preliminary decree had been varied and L R. [1947] All. 40.

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to execute the final decree in accordance therewith. In this view of the matter we are of opinion that the view taken in Periakaruppan Chettiar's case(1) is correct subject to what we have said with respect to the case where there are specific directions by the appellate court in an appeal from the preliminary decree for preparation of a fresh preliminary decree or for fixing a fresh time for payment.

We do not think it necessary to refer in detail to other cases cited before us. It is enough to say that the Andhra Pradesh High Court has followed the Madras High Court : [see Gandavaraup Venkata Subba Rao v. Vavilal Kesavayva(2)] while the Calcutta High Court in Abdul jalil v. Amar Chand Paul (3) and the Lahore High Court in Mewa Singh v. Tara Singh(4) seem to take the view that a fresh final decree is necessary within three years of the appellate decree in an appeal from the preliminary decree in a case of modification.

In the view we have taken the appeal fails and is hereby dismissed with costs.

Y.P Appeal dismissed.

(1) I.L.R. [1947] Mad. 132.
(3) [1913] XVIII Cal.L.J.223
(2) A.I.R. [1955] A.P. 254.
(4) A.I.R. [1933] Lah. 859.

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