

(1956) 02 MAD CK 0063
In the Madras High Court

Methala Veluthedath Raghavan Nair and Another	APPELLANT
Vs	
Palakunnath Kozhikkal Achuthan Nair and Others	RESPONDENT

Date of Decision : 17-02-1956

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47

Citation : (1956) 2 MLJ 534

Hon'ble Judges : Basheer Ahmed Sayeed, J

Bench : Division Bench

Judgement

Basheer Ahmed Sayeed, J.—The 2nd respondent in this appeal is the mortgagee-decree-holder. The 3rd respondent is the mortgagor while the first respondent is the auction purchaser. Respondents 4 and 5 are sub-kanamdars under the 3rd respondent. The petitioners are the assignee of the respondents 4 and 5. After a decree was passed against the mortgagor, the decree-holder brought the rights of the mortgagor in the kanam to sale and they were purchased by the first respondent in the Court auction. After the purchase the first respondent managed to take actual possession of the property without reference to the rights of the respondents 4 and 5, since assigned to the appellants. From the judgment of the learned District Munsif the following facts can be gathered. In the suit, respondents 4 and 5 were ex parte. In the execution proceeding they appeared and filed a counter and stated that a portion of the A-schedule property was in the actual possession of the 5th respondent as per a sub-demise granted by the mortgagor from the 3rd respondent and the other portion was in the possession of the 4th respondent as per an oral munpattam lease taken by him with an annual rent of Rs. 8. They prayed before the execution Court that their kanam and kuzhikur rights should be reserved. Without going into the truth or otherwise of these claims, the executing Court ordered the decree-holder to amend the draft proclamation in the light of the objection raised by respondents 4 and 5. In consequence of the amendment the sale proclamation then showed that the decree-holder conceded/that if defendants 2 and 3 had any rights in the property they should be reserved and that only the first defendant's rights alone

should be sold. He meant by the expression first defendant the 3rd respondent in this appeal. In the encumbrance column also it was stated that the kanam, kuzhikur and chamayam rights belonging to defendants 2 and 3 were reserved and it was only the first defendant's right that was sold. The sale-certificate carried into it also the reservation made in favour of the 2nd and 3rd defendants. The learned District Munsif held that the sale certificate only showed that it was only the kanam and kuzhikur rights belonging to the respondents 4 and 5 that were reserved and nothing more. There was no reference to the oral lease set up by the 4th respondent. Notwithstanding this fact the auction-purchaser took possession of the entire property. This is the grievance of the present appellants.

2. The first contention as put forth by Mr. Ramakrishna Iyer, the learned Counsel for the appellants, is that the decree was a mortgage decree and in that case the auction-purchaser became the representative of the mortgagee decree-holder and the respondents 4 and 5, are the assignors of the appellants, and the conflicting interest is between these and the auction-purchaser. Such being the case, his further contention is that the learned District Munsif ought not to have rejected the application for re-delivery made by the appellants in so far as their interest was concerned, and the finding that the matter did not arise in execution was not correct and the lower appellate Court was not justified in rejecting the appeal preferred against the decision of the learned District Munsif on the ground that no appeal lay as the matter did not arise in execution and did not satisfy the requirements of Section 47 of the Civil Procedure Code.

3. It is to be observed that the question whether the auction-purchaser in a sale held under a mortgage-decree is a representative of the decree-holder or the judgment-debtor has not been finally decided as yet by this Court. The matter was no doubt referred to a Full Bench in *Veyindramuthu Pillai v. Maya Nadan* (1919) 38 M.L.J. 32 : ILR Mad. 107 . But this does not appear to have been set at rest by the judgment of the learned Judges of the Full Bench. The matter would appear to have been once again referred to a bench of five Judges in *Thondam Annamalai Mudali Vs. Tiruttani Ramasami Mudali and Others*, . Even then, the Full Bench did not decide the question as to whether an auction-purchaser in execution of a mortgage decree is the representative of the mortgagee decree-holder or the mortgagor judgment-debtor. The general impression gathered from a reading of the judgments in these two references, namely *Veyindramuthu Pillai v. Maya Nadan* (1919) 38 M.L.J. 32 : ILR Mad. 107 , and *Thondam Annamalai Mudali Vs. Tiruttani Ramasami Mudali and Others*, , is that that question is still left open; but this much appears to be very clear, namely, that so far as this Court is concerned the auction-purchaser in a money decree is only the representative of the judgment-debtor and never that of the decree-holder. But this definite view of this Court does not help the present case before me. Mr. Ramakrishna Iyer invited me to decide that in mortgage decrees when an auction-purchaser purchases the property in execution he should be held to be only the representative of the mortgagee-decree-holder and not that of the mortgagor judgment-debtor. I do not think, sitting singly as I do, I should

take this responsibility of deciding this issue on a matter like this. This probably is a matter which must be left to a Bench or a Full Bench when the occasion arises and when reference is to be made on this question.

4. But so far as the facts of this case are concerned it seems to me to be just and proper that one or two courses should be adopted. One is to follow the general principles laid down in (1892) L.R. 19 I.A. 166 (Privy Council) *Sarat Chunder Dey v. Gopal Chunder Laha* (1893) L.R. 19 IndAp 203 : ILR 20 Cal. 296 (P.C.), 22 CWN 553 (Privy Council) the observation and opinion of the learned Officiating Chief Justice in *Veyindramuthu Pillai v. Maya Nadan* (1919) 38 M.L.J. 32 : ILR Mad. 107 , and also the decision in *Jainulabdin Sahhib Vs. Krishna Chettiar* , and decide that, in view of the respondents 4 and 5 having been parties to this suit, their interest is now opposed to the interest of the auction-purchaser and that the mortgagee decree-holder has interest in supporting the claim of the auction-purchaser and the matter being one in execution, Section 47 of the CPC would apply and that in that view when once the learned District Munsif has rejected that application, the aggrieved party, namely, the appellants, would have a right of appeal before the appellate Court and that the decision of the appellate Court in having dismissed the application on the ground that the appeal was incompetent should be set aside and the matter should be remanded back to the appellate Court to decide the question raised on merits after hearing the parties.

5. The other course that can be followed is that even though Section 47 does not strictly apply to the facts of the case, still the application of the appellants could be treated as a plaint in the suit and that they should be directed to present it to the proper Court on payment of the legitimate Court-fee and the matter then should be tried as a suit and decided upon. This course will be in accordance with the opinion held in *Gulam Rasool Saheb Vs. Hamida Bibi* , by Satyanarayana Rao, J. But so far as I am concerned I think I should prefer to follow the earlier course, namely, that this matter should be considered to be one that arises in execution and that it should be enquired into as an application u/s 47 and decided according to merits. In this view, I think the decision of the appellate Court will be set aside and it will be remanded to the lower appellate Court for a fresh hearing and disposal in the light of the observations contained herein above. The costs will abide the result.

6. Mr. Gopalan Nambiar very strongly urged that this appeal is governed by the decision in *A. Mallari Rao Vs. Sivagnana Vandayar* , . But so far as the facts of this I case are concerned I am unable to agree with the view put forth by Mr. Gopalan Nambiar on behalf of the auction-purchaser. Leave refused.