

(1941) 04 MAD CK 0014
In the Madras High Court

Nagarajan represented by his adoptive mother and guardian
Indra Bai Ammal

APPELLANT

Vs

P.T. Krishna Aiyar alias Krishna Rao and Another

RESPONDENT

Date of Decision : 03-04-1941

Acts Referred:

Citation : AIR 1942 Mad 296 : (1941) 54 LW 184 : (1941) 2 MLJ 298

Hon'ble Judges : Wadsworth, J

Bench : Division Bench

Judgement

Wadsworth, J.—This appeal is preferred against an order allowing an application u/s 23 of Madras Act IV of 1938. No appeal lies but a

petition has been filed to convert the appeal into a Civil Revision Petition. We have allowed that petition subject to payment of the deficient court-

fee and have treated the appeal as a Civil Revision Petition. The decree which gave rise to the sale was passed in a suit on a simple mortgage

dated the 17th May, 1928. The suit was filed in 1934. While the suit was pending the mortgagor sold the equity of redemption to the eighth

defendant and the sale-deed recites that the sale was subject to a usufructuary mortgage in favour of the sixth defendant. The preliminary decree

was passed on the 7th March, 1935. Subsequently there was a final decree and certain items were sold before Act IV of 1938 was operative. On

the 17th November, 1937, the decree-holder brought to sale items 4 and 5 and purchased them himself. On the 20th June, 1938, that is to say,

within the period allowed u/s 23 of the Act, the mortgagor applied u/s 23 to set aside the sale of these items. The learned Subordinate Judge held

that the mortgagor being an agriculturist by reason of the ownership of other lands, had an interest in the land sold and was entitled to apply on the

basis that Section 23 does not require that the applicant must have had an interest in the land sold either on the 1st October, 1937, or thereafter.

This view of the law requires modification in the light of our decision in C.M.A. No. 255 and 258 of 1939. In the judgment in that case we

observed that the clause "" where in execution of any decree any immovable property in which an agriculturist had an interest has been sold

contemplates the existence of an interest owned by an agriculturist at the time of the sale. We also held that it was not necessary that the judgment-

debtor who applied to the Court on the basis that he was an agriculturist entitled to the benefits of the Act should be the same agriculturist as the

person who had an interest at the time of the sale. It follows from this decision that the basis of the decision of the learned Subordinate Judge is to

some extent incorrect.

2. The respondent here, the mortgagor, has sought to support the decision on two different grounds : firstly, he has contended that since the

mortgagor as a judgment-debtor has a right to redeem the mortgage, this right of redemption, subsisting on the date of the Court auction sale, is an

interest in the property sold. We cannot accept this contention. Whatever may be the position in the case of a decree on a usufructuary mortgage

or a mortgage by conditional sale, on the facts of the present case the most that the mortgagor could get by redeeming the mortgage would be a

right to the return of the mortgage-deed with an endorsement of discharge and the delivery of the title deeds of the land, which he would then have

to hold as a trustee for his vendee. We cannot accept the contention that such a right connotes an interest in the property sufficient to satisfy the

first clause in Section 23 of Act IV of 1938. The case of Sundaram alias Mytheenbibbi Vs. Mamsa Mavuthar, Sheikkasim Mavuthar, , which has

been cited by the respondent has no bearing on the present facts.

3. The second contention is that, granting that there must be an agriculturist with an interest in the property sold at the time of the sale, the sixth

defendant is such a person. It appears from the judgment of the learned Subordinate Judge that the sale by the mortgagor to the eighth defendant

was subject to a usufructuary mortgage in favour of the sixth defendant. The sixth defendant was impleaded in the suit and he appeared by an

advocate. The decree recites that he was impleaded as a person claiming a right

to enjoyment of the mortgaged property. We do not know what was the extent of the sixth defendant's usufructuary mortgage nor whether it was subsisting at the time of the sale; nor has it been established that the sixth defendant is an agriculturist. The lower Court however proceeds on the assumption that the sixth defendant's usufructuary mortgage was subsisting and if so, since the land in question is agricultural land he would prima facie be an agriculturist unless disqualified under one of the provisos to Section 3 (2) and it would be incumbent upon the decree-holder to establish the disqualification. It is contended on behalf of the appellant that this Court is not justified in instituting an inquiry into the question of the sixth defendant's status and interest in the absence of a specific averment in the application that the sixth defendant had at the time of the sale such an interest as would provide a basis for the application by the mortgagor. In fact the application contains no express averment as to the existence of an interest in any agriculturist at the time of the sale; and in the lower Court it does not appear to have been realised that this was a matter of any importance. The applicant having succeeded on the basis of his general contention that as the mortgagor of the property and the judgment-debtor he himself had such an interest as would entitle him to maintain the application and that contention having been negated by this Court, it does not seem to us right to refuse to the applicant an opportunity to establish a subsidiary contention upon which he could have fallen back in the lower Court had the lower Court rejected his main contention. More especially is it desirable to show this amount of latitude in view of the fact that at the time when this application was heard by the trial Court there was a very considerable doubt as to the precise effect of the words used in the opening portion of Section 23.

4. In the result, therefore, treating this appeal as a revision petition we allow the petition and set aside the order of the trial Court and remand the application for fresh disposal directing the lower Court to take such evidence as may be tendered regarding the existence of an interest in favour of the 6th defendant at the time of the Court sale in these items and the question of the agriculturist status of the 6th defendant. Costs in this Court will abide the result.