

(1931) 10 MAD CK 0031
In the Madras High Court

Sinna Pillai alias Pir Kadir Ammal and Others

APPELLANT

Vs

Karrupati Alla Pichai alias Gulam Mohideen Rowther

RESPONDENT

Date of Decision : 14-10-1931

Acts Referred:

Citation : 138 Ind. Cas. 819 : (1932) 35 LW 257

Hon'ble Judges : Ouruenvan, J

Bench : Single Bench

Judgement

Ouruenvan, J.—The appellant is the widow of one Musaku Rowthan, against whom the respondent obtained a money decree in 1910. The judgment-debtor died in 1920, and the appellant was brought on as his legal representative. In 1922 the decree-holder attached an othi or usufructuary mortgage interest which had been held by the judgment debtor upon a property the equity of redemption of which had been sold by the mortgagor to the appellant in 1906 : so that, at the time of the attachment both the mortgage interest (if it still subsisted) and the equity of redemption vested in the appellant. The attachment, it is contended on the authority of Ramasami Mooppan v. Srinivsa Iyengar 28 Ind.Cas.284 : 89 M. 389 : 28 M.L. 338, should have been made, as of a debt, under Order XXI, Rule 46 Civil Procedure Code, but in point of fact it was made, as of immovable property, under Rule 54 of that Order. This error of procedure does not, however, I think, affect the position. The othi interest was brought to sale and was purchased by the decree-holder. He then filed an application for delivery of possession to him of the mortgaged property. The District Munsif framed two issues, the first inquiring whether the othi debt had been discharged before attachment, and the second whether the purchaser was not entitled to delivery. He found that the debt had been discharged, and he, therefore, refused to give delivery. The Subordinate Judge differed on the former point, and allowed the application. It is from this order that the appeal is preferred.

2. The sale certificate shows that what was sold was the "usufructuary mortgage debt." The first point taken for the appellant is that the executing Court cannot

inquire into the truth of the debt, or its subsistence at the time of the attachment, but sells it for what it may be worth and leaves the purchaser to pursue his remedy elsewhere. This, I think, is a correct statement of the position when the purchaser of the debt is a third party. I had occasion to decide the point recently in the case of a simple debt in C.R.P. No. 207 of 1931 *Alwar Aiyangar v. Subramania Dikshetha* 136 Ind. Cas. 337 (1) 34 L.W. 906 : 61 M.L.J. 863 : AIR 1932 Mad 169 : (1932) M.W.N. 280, and held, following *Ma Saw Yin v. Hockto* 97 Ind. Cas. 247 : 4 Rang. 100 : AIR 1926 Rang. 175 and *Maharaja of Benares v. Patraj Kunwar* 28 A. 262 that it is not for the executing Court to determine whether the debt is actually due or not. *Lakshmana Rao, J.*, has taken a similar view in C.M.S.A. No. 89 of 1927. I do not think that the position is altered by the debt being secured by a mortgage, usufructuary or otherwise, but it is urged that it does make a difference that the purchaser is the decree-holder himself. It is no doubt true that the executing Court has power under Sections 47 and 50 of the Code to ascertain by inquiry the extent of the property of a deceased judgment-debtor which has come into the hands of his legal representative, and if further authority were needed for this position it is to be found in such cases as *Arundadhi v. Natesha* 5 M. 391 *Kuriyali v. Mayan* 7 M. 255, *Vengapayyan v. Karimpanakal Parvati* 26 M. 501 and *Punchanun Bundopadhyaya v. Rabia Bibi* 17 C. 711 (F. B.). But to apply this principle to the circumstances of the present case it is needful to inquire what useful purpose would be served by such an inquiry, and this involves an answer to the second question, whether the executing Court can, upon the strength of his sale certificate, put the purchaser in possession of the property.

3. I do not think that the decree-holder, qua purchaser, occupies any more favourable position than a third party auction-purchaser. We have to look in each case to the nature of the property purchased, and the facilities which the execution provisions of the Code afford him for realising the proceeds of that purchase. The purchase was of an usufructuary mortgage debt, and such a debt it has been held see the decision of *Phillips, J.* in *Venkalakshmi Ammal v. Mathurbutham Iyer* (1929) M.W.N. 138 is movable property and is attachable as such under Rule 46 of Order XXI. Upon sale the method of delivery is, as provided for in Rule 79(3), by a prohibitory order of the court resembling that made on attachment. It is only upon the sale of immovable property that delivery of possession of that property can be ordered, under Rule 95. I have been shown no authority for the view that the purchaser of an usufructuary mortgage right buys such an interest in immovable property as would entitle the executing Court to proceed under this rule. Although, as has been said, the attachment was actually made under Rule 54, it has not been suggested that that circumstance can invest the sale with a character and consequences which would be inapplicable to the kind of property which formed its subject-matter. I must hold accordingly that the purchaser of an usufructuary mortgage-debt, whether or not he be also the decree-holder, cannot get anything more from the executing Court than his sale-certificate. If that be so, it appears to me to follow

that no occasion can arise for that court to adjudicate upon the question of the subsistence of the debt, whatever powers it may have in the case of a decree-holder auction-purchaser to do so. It should leave the whole question of proof and enforcement of the debt to other proceedings.

4. The result must be, therefore, that the appeal is allowed, the order of the lower Appellate Court set aside, and the order of the District Munsif restored with costs throughout.