

(2019) 07 CHH CK 0179
In the Chhattisgarh High Court
Case No : Second Appeal No.444 Of 2005

Dihalram Rajwar @ Balram Rajwar, And Ors	APPELLANT
Vs	
Ram Kumar And Ors	RESPONDENT

Date of Decision : 31-07-2019

Acts Referred:

Madhya Pradesh Sahakari Bhoomi Vikas Bank Adhiniyam, 1966 — Section 23, 36
Madhya Pradesh Co-Operative Societies Act, 1960 — Section 40(1), 40(2)
Transfer Of Property Act, 1882 — Section 58
Specific Relief Act, 1963 — Section 31

Citation : (2019) 07 CHH CK 0179

Hon'ble Judges : Sanjay K. Agrawal, J

Bench : Single Bench

Advocate : Manoj Paranjpe, Anshul Tiwari, Aditya Chopda, Aakash Pandey

Final Decision : Dismissed

Judgement

Sanjay K. Agrawal J

1. This defendants' (No.4 & 5) second appeal has been admitted for hearing on the following substantial questions of law: -

1. "Whether the observation of the learned lower appellate Court recorded in paragraph-18 of the impugned judgment whereby a finding has been recorded that the sale deed of the appellants is void, is justified in view of the fact that validity of the sale deed was never in question?"

2. "Whether the learned lower appellate Court was justified in declare the sale deed of Ex.D/2 in favour of Nanka Ram, Balram, Achambhit Ram, Tilsai, Tileshwar and Shobhnath void, is legal particularly when the beneficiaries of the sale deed were not party to the proceedings?"

3. "Whether the finding of the learned lower appellate Court in paragraph-18 that land in question was mortgaged with the Land Development Bank on 09.01.1976, is perverse and the same has been recorded without any

foundation?"

2. The suit property was originally held by defendant No.3 - Narendra Bahadur Singh. He mortgaged the suit land in favour of defendants No.1 & 2 Bank against the loan advanced by them, but he did not repay the loan and therefore the mortgaged property was sold in auction and the plaintiff had purchased the same in the auction sale and auction sale certificate has already been issued in his favour on 22-9-1989 under Section 23 of the M.P. Sahakari Bhoomi Vikas Bank Adhiniyam, 1966. After the suit land was mortgaged with the Bank, defendant No.3 - original holder had also sold the suit land in favour of the plaintiff on 2-5-1978, whereas by creating mortgage, loan was taken on 28-1-1976. The plaintiff filed suit for declaration of title and for recovery of possession and in alternative, refund of amount from defendants No.1 & 2 which the trial Court partly decreed directing that the plaintiff will be entitled for refund of ₹ 17,000/- along with interest. On appeal being preferred by the plaintiff, the first appellate Court allowed the appeal holding that defendant No.3 was not entitled to sale in favour of the present appellants (defendants No.4 & 5) by virtue of sub-sections (1) & (2) of Section 40 of the Madhya Pradesh Co-operative Societies Act, 1960 and set aside the judgment & decree of the trial Court. This is an appeal preferred by defendants No.4 & 5 who are purchasers from the original owner / borrower who had firstly mortgaged the suit property in favour of the Bank on 28-1-1976 and thereafter, sold it to defendants No.4 & 5 on 2-5-1978 in which substantial questions of law have been framed which have been set- out in the opening paragraph of this judgment.

3. Mr. Manoj Paranjpe, learned counsel for the appellants / defendants No.4 & 5, would submit that the first appellate Court was absolutely unjustified in holding that the sale made in favour of defendants No.4 & 5 is void, as the plaintiff did not ask for cancellation / declaration of the sale made by defendant No.3 in favour of defendants No.4 & 5 and since, he has not asked for the relief of cancellation / declaration of the sale deed executed by defendant No.3 in favour of defendants No.4 & 5, the first appellate Court was absolutely unjustified in holding that no title has been passed and the sale made is void.

4. Mr. Aditya Chopda, learned counsel for respondent No.1 / plaintiff would support the impugned judgment & decree.

5. I have heard learned counsel for the parties, considered their rival submissions and went through the record with utmost circumspection.

6. Admittedly, defendant No.3 - the original holder, mortgaged the suit land in favour of defendants No.1 & 2 on 28-1-1976 for taking a loan of ₹ 4,925/- and vide Ex.P-2, the suit property was auctioned on 23-6- 1989 in favour of plaintiff Ram Kumar and sale certificate was issued on 22-9-1989 under Section 23 of the M.P. Sahakari Bhoomi Vikas Bank Adhiniyam, 1966. The plaintiff brought suit for possession of the said suit land stating that he has not been given possession and in alternative, prayed for refund of amount. The trial Court has granted

refund of the money deposited by the plaintiff, but the first appellate Court has set aside the decree by granting the appeal of the plaintiff, though no further decree was granted in favour of the plaintiff.

7. The main grievance of the appellants herein / defendants No.4 & 5 is that the sale deed in their favour dated 2-5-1978 (Ex.D-2) was not questioned by the plaintiff in his suit; unless the said sale deed is questioned, the plaintiff cannot succeed and the first appellate Court is unjustified in annulling his sale deed as void.

8. It is admitted position on record that the suit land was mortgaged by defendant No.3 in favour of defendants No.1 & 2 Bank on 28-1-1976. Once the suit land is mortgaged, defendant No.3 during the subsistence of the property being mortgaged, was not empowered to transfer the suit land further in favour of defendants No.4 & 5, as the property was already mortgaged with defendants No.1 & 2 Bank and the sale deed executed by defendant No.3 in favour of defendants No.4 & 5 was in violation of the provisions of the M.P. Sahakari Bhoomi Vikas Bank Adhiniyam, 1966. Even otherwise, once the property is mortgaged, interest on that immovable property is created in favour of defendants No.1 & 2 Bank under Section 58 of the Transfer of Property Act. The submission of Mr. Paranjpe that even in that condition, if sale deed is executed in violation of the provisions of law then also the plaintiff was required to ask for cancellation of sale deed, deserves to be rejected.

9. The Supreme Court in the matter of Mahadeo Prasad Singh and another v. Ram Lochan and others (1980) 4 SCC 354 has clearly held that the sale which was entirely without jurisdiction was non est in the eye of law and such a nullity does not from its very nature, need setting aside. It was observed as under: -

"34. This is not a case of an irregular or voidable sale which continues to subsist so long as it is not set aside, but of a sale which was entirely without jurisdiction. It was non est in the eye of law. Such a nullity does not from its very nature, need setting aside."

10. Similarly, in the matter of Prem Singh and others v. Birbal and others (2006) 5 SCC 353, the Supreme Court has held that when a document is valid, no question arises of its cancellation and when a document is void ab initio, a decree for setting aside the same would not be necessary as the same is non est in the eye of the law, as it would be a nullity.

11. In the instant case, it is quite vivid that defendant No.3 having mortgaged the suit land in favour of defendants No.1 & 2 Bank under Section 36 of the M.P. Sahakari Bhoomi Vikas Bank Adhiniyam, 1966 again alienated the same in favour of defendants No.4 & 5 by executed sale deed which runs contrary to the provisions of the M.P. Sahakari Bhoomi Vikas Bank Adhiniyam, 1966, therefore, the sale being void in its inception, the plaintiff was not required to ask for cancellation of the said sale deed under Section 31 of the Specific Relief Act, 1963. Even otherwise, the plaintiff is auction purchaser from defendants No.1 &

2 Bank under the provisions of the M.P. Sahakari Bhoomi Vikas Bank Adhiniyam, 1966 in whose favour the property was auctioned by order dated 11-8-1989 and sale certificate has been issued under Section 23 of the said Adhiniyam, 1966. As such, the first appellate Court is justified in holding that by the impugned sale, defendants No.4 & 5 have not derived any title over the suit land by purchasing from defendant No.3 by the said sale deed and the plaintiff has purchased the suit property in auction sale and therefore he is the title holder of the suit land.

12. In view of the aforesaid analysis, I do not find any perversity or illegality in the impugned judgment & decree by which the first appellate Court has held that the sale deed executed by defendant No.3 in favour of defendants No.4 & 5 is a void document by which no title has been conveyed in their favour. The substantial questions of law are answered accordingly.

13. I do not find any merit in the second appeal. The second appeal deserves to be and is accordingly dismissed. The appellants herein will bear their own costs as well as that of the plaintiff.

14. At this stage, Mr. Aditya Chopda, learned counsel appearing for the plaintiff / respondent No.1 herein, submits that the cross-appeal filed by the plaintiff namely S.A.No.549/2005 has been dismissed in default for which he is taking steps for restoration. However, liberty may be granted to proceed with that proceeding in accordance with law.

15. The plaintiff is at liberty to proceed with the restoration proceeding. However, this judgment will not affect the rights of the respondents in the cross-appeal, if restored.

16. Decree be drawn-up accordingly.