
(2014) 05 CHH CK 0022
In the Chhattisgarh High Court
Case No : Second Appeal No. 338 of 2001

Hajaru Ram

APPELLANT

Vs

Phagu Ram

RESPONDENT

Date of Decision : 15-05-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 6, 100, 96
Madhya Pradesh Co-operative Societies Act, 1960 — Section 41(a), 41A, 41A(5)
Madhya Pradesh Land Revenue Code, 1959 — Section 165, 165(6)

Citation : (2014) 4 CGLJ 10

Hon'ble Judges : Sanjay K. Agrawal, J

Bench : Single Bench

Advocate : H.B. Agrawal, Senior Advocate, Meera Jaiswal and A.K. Prasad, Advocate for the Appellant; H.B. Agrawal, Senior Advocate, Meera Jaiswal and A.K. Prasad, Advocate for the Respondent

Judgement

Sanjay K. Agrawal, J.

1. The substantial question of law formulated on 15-6-2012 and to be answered is as under: "Whether the Court below has erred in reversing the judgment and decree of the trial Court holding the purchase of the suit land by the appellants vide sale certificate dated 06.01.1995 is illegal and void, in view of Sub-section (5) of Section 41(a) of the M.P./C.G. Co-operative Societies Act, 1960?"

[For the sake of convenience, the parties will be referred in the instant judgment as were referred in the suit.]

The necessary facts in nutshell required to be noticed for adjudication of the second appeal are as under: (1.1) The suit land bearing Khasra No. 228 area 0.178 hectare situated at Village Karaki, Tahsil Dhaurpur, District Surguja was originally held by defendants No. 3 and 4, namely, Sukhan and Bhukhan, respectively. (Defendants No. 3 and 4 are now dead and their names have been deleted from the array of cause-title by order dated 14-4-2014.) Defendants No. 3 and 4 obtained a loan of Rs. 3,500 from Zila Sahakari Bhoomi Vikas Bank,

Ambikapur (henceforth "the Bank") on 10-2-1969 vide Ex. P-5C for construction of a Well and mortgaged the suit land in favour of the Bank. Thereafter, by sale-deed dated 24-4-1987 (Ex. P-1), defendants No. 3 and 4 sold the suit land in favour of plaintiffs Phagu Ram and Chatar Ram. Thereafter, on default of repayment of the loan to the Bank by defendants No. 3 and 4, the suit land was put to auction by the Bank on 11-2-1994 and ultimately, the auction of the suit land was confirmed in favour of defendants No. 1 and 2, namely, Hajar Ram and Govind Ram, respectively and a sale-certificate was issued in favour of defendants No. 1 and 2 on 6-1-1995 (Ex. D-4). When the suit land was sold by the Bank to defendants No. 1 and 2 in the public-auction held on 11-2-1994, the plaintiffs filed a suit on 30-6-1994 for permanent injunction stating inter alia that defendants No. 1 and 2 are proclaiming to have purchased the suit land and trying to interfere with their peaceful possession.

(1.2) On being summoned, defendants No. 1 and 2/auction-purchasers appeared before the trial Court and not only filed their written statement opposing the plaint averments but also invoked Order 8 Rule 6 of the Code of Civil Procedure, 1908 (henceforth "the CPC") making a counter-claim stating inter alia that they had purchased the suit land in the public-auction held on 11-2-1994 and the sale-certificate-(Ex. D-4) has been issued in their favour and they are entitled for a declaration of title over the suit land in their favour."

2. The trial Court, on appreciation of the pleadings of the parties, framed 6 issues and answered them as follows:

By judgment and decree dated 28-7-1995 in Civil Suit No. 105-A/1994, the trial Court dismissed the suit of the plaintiffs, but decreed the counter-claim holding that defendants No. 1 and 2 are title-holders of the suit land and not only decreed the suit land but also decreed other lands which were not in dispute and were purchased by the auction-purchasers defendants No. 1 and 2 in the public-auction held on 11-2-1994.

3. On an appeal being filed by the plaintiffs under Section 96 of the CPC, the first appellate Court, by judgment and decree dated 7-7-2001 in Civil Appeal No. 24-A/1995, allowed the appeal and set aside the judgment and decree passed by the trial Court holding that the auction made is in violation of Section 41-A(5) of the Madhya Pradesh/Chhattisgarh Cooperative Societies Act, 1960 (henceforth "the Act of 1960") and thereby the counter-claim of defendants No. 1 and 2/auction-purchasers stands dismissed.

4. Questioning the legal acceptability and correctness of the impugned judgment and decree passed by the first appellate Court dismissing the counterclaim of defendants No. 1 and 2 and decreeing the plaintiffs' suit, defendants No. 1 and 2 preferred the instant appeal under Section 100 of the CPC, in which substantial question of law has been formulated by order dated 15-6-2012 and the same has been quoted in first paragraph of this judgment.

5. Shri H.B. Agrawal, learned Senior Advocate appearing for the appellants/

defendants No. 1 and 2 would submit that the first appellate Court has committed a manifest error of jurisdiction in holding that the auction in question is hit by Section 41-A(5) of the Act of 1960. He would further submit that neither there is pleading made nor there is evidence brought on record to hold that the auction-sale is hit by Section 41-A(5) of the Act of 1960.

6. As against this, Shri A.K. Prasad, learned counsel appearing for respondents No. 1 and 2/plaintiffs would submit that the first appellate Court, relying upon the documents (Ex. D-3 and Ex. P-5), has rightly held that defendants No. 3 and 4 were Gond by caste (aboriginal tribes) and the auction- purchasers defendants No. 1 and 2 are not the persons belonging to aboriginal tribe and as such there is no illegality in the judgment and decree passed by the first appellate Court requiring interference by this Court in exercise of jurisdiction under Section 100 of the CPC.

7. I have heard learned counsel appearing for the parties at length and have also perused the record with utmost circumspection.

8. It is undisputed factual position which emerges on the record that the suit land was mortgaged by defendants No. 3 and 4 in favour of the Bank on 10-2-1969 (Ex. P-5C) and thereafter it was transferred to the plaintiffs on 24-4-1987 (Ex. P-1) and defendants No. 3 and 4 having failed to make repayment of the loan obtained from the Bank, the suit land was put to auction on 11-2-1994 and in which defendants No. 1 and 2 were the auction-purchasers and the auction- sale was confirmed in favour of defendants No. 1 and 2. The suit was filed by the plaintiffs for permanent injunction restraining the auction-purchasers from interfering with their peaceful possession in which the auction-purchasers/defendants No. 1 and 2 have made the counter-claim stating inter alia that defendants No. 1 and 2 are purchasers in the public-auction and in which the sale-certificate (Ex. D-4) has been issued in their favour on 6-1-1995 and they are entitled for a declaration to that effect.

9. The trial Court, relying upon the sale- certificate and other documents issued by the Bank, granted decree in favour of defendants No. 1 and 2 holding that defendants No. 3 and 4 had already mortgaged the suit land in favour of the Bank and having failed to make repayment of the loan by defendants No. 3 and 4, the suit land came to be auctioned in which defendants No. 1 and 2 purchased the suit land.

10. On the first appeal filed by the plaintiffs, the first appellate Court reversed the finding of the trial Court relying upon Section 41-A(5) of the Act of 1960, which runs thus:

"41-A. Right of society to acquire and dispose of immovable property.--xxxx xxxx

(5) Nothing in this section shall be construed to empower the society to sell any land or interest therein of a person belonging to an aboriginal tribe which has been declared to be an aboriginal tribe by the State Government by notification

under sub-section (6) of section 165 of the Madhya Pradesh Land Revenue Code, 1959 (No. 20 of 1959) to a person not belonging to such tribe."

11. From a careful and close perusal of sub-section (5) of Section 41-A of the Act of 1960, it would appear that a society is not empowered to sell any land of a person belonging to aboriginal tribe declared so by the State Government by a notification under sub-section (6) of Section 165 of the Madhya Pradesh/ Chhattisgarh Land Revenue Code, 1959 (henceforth "the LR Code") to a person not belonging to such tribe.

12. The question that needs consideration is whether the plaintiffs have pleaded and established that defendants No. 3 and 4 were aboriginal tribes notified under Section 165(6) of the LR Code and defendants No. 1 and 2/auction-purchasers are persons not belonging to aboriginal tribe.

13. Though pursuant" to the counter-claim, by way of amendment the plaintiffs have amended their plaint opposing the counter-claim yet neither any defence has been inserted nor any plea has been taken that defendants No. 3 and 4 were the persons belonging to aboriginal tribe duly notified under Section 165(6) of the LR Code nor it has been established that defendants No. 1 and 2 are the persons who are non-aboriginal tribes. Thus, neither Section 41-A(5) of the Act of 1960 was pressed into service nor any pleading with regard to defendants No. 3 and 4, who had mortgaged the suit land in favour of the Bank, that they were aboriginal tribes as notified under Section 165(6) of the LR Code was taken. The first appellate Court has read over two documents to hold that defendants No. 3 and 4 were aboriginal tribes within the meaning of Section 165(6) of the LR Code. In my considered opinion, the first appellate Court has committed an illegality in holding so. It was the duty of the plaintiffs opposing the counter claim not only to clearly plead and establish that defendants No. 3 and 4 were the duly notified aboriginal tribes under Section 165(6) of the LR Code and the auction-sale was made to the non-aboriginal tribes and that Section 41-A(5) of the Act of 1960 is squarely attracted to the instant case. Thus, the plaintiffs have miserably failed to plead and prove the applicability of Section 41-A(5) of the Act of 1960 and the first appellate Court has committed the illegality in inferring without there being pleading that defendants No. 3 and 4 were members of the aboriginal tribe and the sale made in the public-auction by the Bank is hit by Section 41-A(5) of the Act of 1960. The substantial question of law is answered accordingly.

14. Consequently, the second appeal deserves to be and is hereby allowed. The impugned judgment and decree passed by the first appellate Court is set aside. The judgment and decree passed by the trial Court is affirmed. There shall be no order as to costs. A decree be drawn-up accordingly.